आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI ANIL CHATURVEDI, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील स / ITA No.1013/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

Shri Ramesh Haribhau Gawali,
107, Samartha Apartments,
Near Gulmohar Police Chowkey,
Swami Samartha Mandir,
Ahmednagar – 414 003.

..... अपीलार्थी /
Appellant

PAN : AHEPG1692H.

बनाम v/s

The Income Tax Officer,
Ward – 1, Ahmednagar.

..... प्रत्यर्थी /
Respondent

अपीलार्थी की ओर से / Appellant by : Shri S.N. Doshi.

प्रत्यर्थी की ओर से / Respondent by: Shri Mukesh Jha, JCIT.

सुनवाई की तारीख / Date of Hearing : 22.03.2018		घोषणा की तारीख / Date of Pronouncement: 11.04.2018

आदेश / ORDER

PER ANIL CHATURVEDI, AM :

This appeal of the assessee is emanating out of the order of Commissioner of Income Tax (A) – 2, Pune dated 30.01.2015 for the assessment year 2010-11.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual and stated to be engaged as a Civil Contractor. Assessee filed his return of income for A.Y. 2010-11 on 15.10.2010 declaring total income of Rs.14,50,480/-. The case was

selected for scrutiny and thereafter the assessment was framed under Section 143(3) of the Act vide order dated 20.03.2013 and the total income was determined at Rs.2,85,15,290/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 30.01.2015 (in Appeal No.PN/CIT(A)-2/ITO wd-1 AN/AN/77/2014-15) granted partial relief to the assessee. Aggrieved by the order of Ld CIT(A), assessee is now in appeal before us and has raised the following grounds:

> "*1. On the facts and in the circumstances of the case the CIT(A) has erred in disallowing Rs.2,24,63,228/- u/s 40(a)(ia) of the IT Act, 1961.*
>
> *2. On the facts and in the circumstances of the case the CIT(A) has erred in sustaining disallowance of Rs.13,10,000/- the expenditure incurred on marble purchases.*
>
> *3. On the facts and in the circumstances of the case the CIT(A) has erred in sustaining the disallowance of Rs.2,27,500/- u/s 40A(3) of the IT Act.*
>
> *4. On the facts and in the circumstances of the case the CIT(A) has erred in sustaining the above disallowance of expenditure of Rs.5,08,290/-."*

2. Assessee subsequently vide letter dated 09.05.2017 filed additional ground which reads as under :

> *"On the facts and in the circumstances of the case the CIT(A) has erred in disallowing the payment of Rs.2,24,63,228/- by invoking the sec.40(a)(ia) overlooking the fact that appellant was not liable to deduct the tax on the payments made as there never existed any relationship between the appellant and payee as contractor and sub-contractor."*

3. With respect to the prayer for admission of additional ground, it is submitted that the issue raised in the ground goes to the root of the issue and the same can be adjusted on the basis of material available on record without any further investigation of facts and therefore the additional ground be admitted. Considering the submissions of assessee, we admit the additional ground for hearing:

4. First ground and the additional ground is with respect to disallowance of Rs.2,24,63,228/- u/s 40(a)(ia) of the Act.

4.1 On perusing the details furnished by the assessee, AO noticed that assessee had given sub-contracts of Rs.2,24,63,228/- and the TDS liability was shown of Rs.2,41,846/-. AO on further perusing the details noticed that assessee had stated to have paid Rs.1,45,11,384/- to sub-contracts and on such sub-contract payments had paid the TDS of only Rs.1,60,000/- to the account of the Government on 20.10.2010 i.e. after the extended due date of filing the return of income. He was therefore of the view that the expenses of Rs.1,45,11,384/- towards sub-contract payments (listed on page 6 of the assessment order) attracts provision of Sec.40(a)(ia) of the Act and therefore liable for disallowance and accordingly disallowed the same. With respect to the balance sub contract amount of Rs.79,51,844/- (listed at page 7 & 8 of the assessment order), AO noticed that though assessee has stated to have deducted TDS on such sub-contracts payments, but the TDS was not deposited to the account of Government. He accordingly disallowed the amount of sub-contract payment of Rs.79,51,844/- and thus aggregate amount of Rs.2,24,63,228/- was disallowed u/s 40(a)(ia) of the Act. Without prejudice to the aforesaid disallowance u/s 40(a)(ia) of the Act, AO further noted that out of the aforesaid sub-contract payments, payment of Rs.66,98,350/- was also liable for disallowance u/s 40A(3) of the Act since these payments were made by the assessee by bearer cheques. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief to the assessee by holding as under :

> "*4.3 The contentions raised by the Ld. Counsel for the appellant are carefully examined in the light of the facts of the case and findings in the assessment order. Though the Assessing Officer has made disallowance of Rs.2,24,63,228/- under section 40(a)(ia) in the assessment order, the dispute raised in the grounds of appeal is only in respect of disallowance of Rs.1,45,11,384/- relating to subcontract payments made to six parties as listed in Para 4.1 hereinabove. The prime contention of the appellant in this regard is that cheque for remittance of TDS of Rs. 1,60,000/- was tendered to the bank on 15.10.2010 though it was cleared on 19.10.2010 and TDS paid challan is dated 20.10.2010 by the bank. It is contended*

that as the TDS on sub-contract amount of Rs. 1,45,11,384/- was deducted and deposited into the Govt. etc on or before the extended due date to file the return of income u/s 139(1) i.e. on 15.10.2010, provisions of sec.40a(ia) are not attracted. The contentions of the appellant are not sustainable in law. In the present case, it is not in dispute that the appellant is liable to deduct the tax at source on the payments made to the sub-contractors. The appellant has also deducted tax at source as per Chapter XVII-B of the IT Act and the liability of appellant to deduct tax at source has also not been disputed. It is also not in dispute that after deducting the TDS, the appellant also made deposit of the tax with the Central Government, but it was paid belatedly. As pointed out by the AO, in the cheque deposit register produced by the appellant in support of his claim that cheque was presented to the SBI on 15.10.2010, there is only seal of 5BI without date stamp of the bank. The official receiving the cheque has also not indicated the date of receipt of the cheque by SBI. Even in the present proceedings, the appellant failed to furnish authentic proof like copy of bank scroll etc. or a certificate from the bank in support of his claim that the cheque was deposited on 15/10/2010 to SBI. In such circumstances, mere furnishing of cheque deposit 'register without any corroborative evidence from the bank concerned does not advance the claim of the appellant that the cheque in question was tendered to SBI on 15/10/2010 more so when the cheque was cleared after four days on 19/10/2010 and not in a day or two. Therefore, the claim of the appellant that cheque for remittance of TDS of Rs.1,60,000/- was tendered on 15/10/2010 cannot be accepted.

4.3.1 Even presuming for a while that cheque was tendered to SBI on 15/10/2010 as claimed by the appellant, TDS in question shall be deemed to have been paid to the Government only when actual payment of tax has been brought to the Government by crediting the amount of taxes to the Central Government which happened on 20.10.2010. The words 'credit' and 'actual' amount paid to the Government of India' as prescribed in TDS provisions clearly, denote that the payment would be treated as made to the Government when the amount is actually credited or actually paid to the Government of India. The time taken for clearing of cheques and Government holidays and reasonable cause etc. are not the reasons, which could be considered while deciding the actual date of payment of TDS to Govt. a/c in view of the aforesaid expressions used in TDS provisions. In this context, it may be appropriate to refer to the decision of ITAT, Agra in the case of G.M., MPRRDA, PIU vs. Income-tax Officer (TDS) (53 SOT 268) wherein on an identical issue, the Tribunal observed as under:

> *"The provisions of section 201 (1A)(ii) of the IT Act, as reproduced above, also put the assessee on liability for payment of interest at the specified rate on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid. Similarly, according to section 200 of the IT Act, the assessee shall have to pay and deposit the amount of TDS at the credit of Central Government, as the Board may prescribe. Rule 30 of the IT Rules noted above, also provides the modes of payment of tax deducted with the provisions of Chapter XVII by paying the amount of tax to the credit of the Central Government within the time prescribed. The cumulative effect of all the above provisions and Rules clearly provide that the assessee has to deposit the tax with the government of India of the amount deducted at source and such tax shall be deemed to be paid to the Government when actual payment of tax has been brought to the Government by crediting the amount of taxes to the Central Government. The word "credit" and "actual amount paid to the Government of India" as prescribed in the above provision clearly denotes that the payment would be*

treated as made to the Government when the amount is actually credited and actually paid to the Government of India. Since the assessee has not deposited the amount of tax within the prescribed time, therefore, the assessee was liable for interest as per the above provisions. The time taken for clearing of cheques and government holidays and reasonable cause etc. are not the reasons, which could be considered while levying the interest against the assessee. Such reasons are irrelevant and alien to the above provisions. Therefore, the contention of the ld. counsel for the assessee cannot be accepted and is, accordingly, rejected. The ld. counsel for the assessee relied upon the decision in the case of Ogale Glass Works Ltd. (supra), in which the issue was relating to taxability of income, profits and gains earned by the assessee in India. In the case of K. Venkata Reddy (supra), the issue was regarding payment of tax by cheque under KVSS under section 90(2) of Finance (No.2) Act, 1998 and it was noted that no such scheme was prescribed in the Act for making payment by cheque. In the case of Pooran Chand Dawar (supra) the issue of investment u/s.54EC was considered. Therefore, in none of the above decisions, the issue of chargeability of interest u/s.201(1A) has been considered. Since section 201(1A) of the IT Act and relevant rules have specific provision of law and put the assessee in liability to pay mandatory interest for delay in depositing TDS within time, the provision of law shall have to be read as it is and cannot be stretched to give different meaning under the law. The decision cited by the ld. counsel for the assessee are, therefore, not applicable to the present controversy."

Thus, ITAT clearly held that payment of TDS would be treated as made to the Government when the amount is actually credited and actually paid to the Government of India and not before.

4.3.2 Adverting to the authorities relied upon by the appellant, in the case of Kumudam Publications (P) Ltd (128 ITR 617), there was delay in en-cashing cheque issued by the officials of Department and in that context it was held that payment is deemed to have been made as per Treasury rules on the date of delivery of cheque to the Govt. Officer competent to receive the payment. In that case it was not in dispute that cheque for payment of advance tax was handed over to the Govt. Officer authorized to receive money on behalf of Govt. on 14.12.1973 i.e. before the due date. In the case of Nanded District Central Co-op Bank Ltd decided on 25-06-2014, the ITAT Pune was dealing with a situation where payment of group gratuity premium was made beyond the specified date and in that case the LIC confirmed that the cheque 'for payment of gratuity premium was received on 30/09/2009 after closure of cash hours i.e. before the prescribed date though the cheque was cleared on 01.10.2009. In that background, ITAT Pune observed that the date of payment of gratuity to LIC is deemed to have been made on 30.09.2009 and the same is an admissible deduction u/s. 43B. Whereas in the present case, as already mentioned, appellant except producing his own cheque deposit register, has not furnished any confirmation from SBI that cheque was deposited on 15.10.2010 though cleared on 20.10.2010. The decisions in other cases relied upon by the appellant were also rendered in different factual context and not with reference to TDS provisions. Thus, in none of the cases relied upon by the appellant, the issue of belated remittance of TDS has been considered and therefore the said decisions have no application to the facts of the present case.

4.3.3 In view of the above legal position, the contention of the

appellant that date of tendering of cheque for payment of TDS is the deemed date of remittance to the Govt. a/c though the cheque was cleared or en-cashed subsequently is not legally tenable on the facts of the case.

4.3.4 The next argument of the appellant is that the amount in question to the sub-contractor was already paid during the year and not outstanding and payable as on 31.03.2010 and therefore provisions of sec.40(a)(ia) are not attracted to the amounts already paid in view of the decision of the Special Bench in the case of CIT Vs. M/s. Merilyn Shipping & Transports (146 TTJ 1). This contention is also not legally sustainable. In the case of Merilyn Shipping & Transports, ITAT Special Bench held that provisions of section 40(a)(ia) are applicable only to amounts of expenditure which are payable as on 31st March of every year and it cannot be invoked to disallow expenditure which has been actually paid during previous year, without deduction of TDS. In the present case, the situation is different where tax was deducted at source but remitted to Govt. a/c belatedly and it is not a case of payment during the year without deduction of tax at source and therefore the decision of Special Bench has no application to the present case. Even otherwise, the provisions of sec. 40(a)(ia) have to be read in conjunction with Chapter XVII-B. Chapter XVII-B provides for deduction of tax at source in respect of certain payments like, payments to contractors/sub-contractors, rent, interest, commission etc. The sections in Chapter XVII-B come into operation once the amount is credited or paid to the account of the payee, whichever is earlier, and it does not provide an exception to the payments made to the payee during the year and not outstanding as on 31st March. If the argument of the appellant that provisions of sec.40(a)(ia) are applicable only to the amounts credited to the accounts of the payee and payable as on 31st March and not to the amounts already paid to the payee during the year is to be accepted, it would not only make a limb of TDS section, which provides for TDS at the time of payment, redundant but also lead to absurd and unjust results. It is a settled rule of interpretation that the provisions of a statute must be harmoniously constructed and an interpretation should be avoided which renders other provisions of the Act otiose or nugatory. In the' present case, as per the books of etc, there was a liability for payment to the above parties and as a result amount was provided in the books of etc and the amount was payable to the payee. It so happened that the appellant discharged the liability wholly or partly by making the payment during the year itself. If the amount had not been paid during the year either wholly or partly, it would have remained outstanding at the end of the year and still shown as payable in the accounts. The act of payment is the last step in discharging any liability and it arises only when there is a liability to pay and the amount is payable to the payee. Merely because the entire liability is discharged by making the payment during the year itself, it cannot be said that the liability is not incurred and the amount is not payable in the initial stage. If the amount is not payable, the question of payment to the payee does not arise. Thus, the expression 'payable' in section 40(a)(ia) is a stage prior to payment and covers 'paid' also on which tax is deductible at source under Chapter XVIIB. In this context, reference can be made to the decision of Gujarat High Court in the case of CIT vs, Sikandarkhan N. Tunvar (357 ITR 312) wherein the HC has categorically held that section 40(a)(ia) would cover not only the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year, of course, as long as the other requirements of the said provision exist and the decision of the Special Bench of the Tribunal in the case of Merilyn Shipping & Transports does not lay down correct law. This legal position was also clarified by the Board

in the circular No.10/DV/2013 [F.NO.279/Misc./M-61/2012-ITJ (Vol. II)], dated 16-12-2013, which reads as under:

> *"It has been brought to the notice of the Board that there are conflicting interpretations by judicial authorities regarding the applicability of the provisions of section 40(a)(ia) of the Income-tax Act, 1961 ('the Act') with regard to the amount not deductible in computing the income chargeable under the head 'Profits and gains of business or profession'*
>
> *2. Section 40(a)(ia) of the Act reads as under:*
>
> *" ... any interest, commission or brokerage, rent, royalty, fees for professional services "- fees for technical services payable to a resident or amounts payable to a contractor on sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 ... ":*
>
> *3. In the case of Merilyn Shipping & Transports Vs. Addl.CIT (2012) 20 taxmann.com 244 (Visakhatatnam) it was held by Special Bench of ITAT, Vishakhapatnam, that the provisions of section 40 (a)(ia) of the Act would apply only to the amount which remained payable at the end of the relevant financial year and could not be invoked to disallow the amount which had actually been paid during the previous year without deduction of tax at source. The order of the Special Bench has since been put under interim suspension by the Andhra Pradesh High Court.*
>
> *3.1 The Hon'ble Calcutta High Court and Hon'ble Gujarat High Court in the case of Commissioner of Income-tax, Kolkata-XI v. Crescent Exports Syndicate [2013] 33 taxmann.com 250 (Calcutta) and Commissioner of Income-tax-IV v. Sikandarkhan N Tunvar [2013] 33 taxmann.com 133 (Gujarat) respectively, have held that section 40 (a)(ia) of the Act would cover not only the amounts which are payable at the end of the previous year but also which are payable at any time during the year.*
>
> *3.2 The Hon'ble High Courts have further held that the intention of the legislation was to disallow certain types of expense, subject to provisions of Chapter XVII-B which at payable at any time during the year but no tax was deducted at source or if deducted was not paid within the stipulated time. There is no such condition that amount should remain payable at the end of the year.*
>
> *3.3 The Hon'ble Allahabad High Court in CIT v. Vector Shipping Service (P.) Ltd. [2013] 38 taxmann.com 77 (Allahabad) has affirmed the decision of the Special Bench in Merilyn Shipping that for disallowance under section 40 (a)(ia) of the Act, the amount should be payable and not which has been paid during the year. However, the decisions of the Hon'ble Gujarat and Calcutta High Courts (supra) were not brought to the attention of the Hon'ble Allahabad High Court. 3.4 In the case of ACIT, Circle 4(2), Mumbai v. Rishii Stock and Shares Pvt. Ltd. in ITA No. 112/Mum/2012, Hon'ble ITAT, Mumbai in its order dated 2-8-2013 has examined the decision of the Hon'ble Allahabad High Court (supra) as regards to section 40(a)(ia) of the Act and concluded that the same was an 'orbiter dicta' while the decisions of the Hon'ble Gujarat and Calcutta High Court (supra) were 'ratio decidendi, The ITAT accordingly applied the view taken by the Hon'ble Gujarat and*

Calcutta High Court as ratio decidendi prevails over an orbiter dicta.

4. After careful examination of the issue, the Board is of the considered view that the provision of section 40(a)(ia) of the Act would cover not only the amounts which are payable as on 31st March of a previous year but also amounts which are payable at any time during the year. The statutory provisions are amply clear and in the context of section 40(a)(ia) of the Act the term "payable" would include "amounts which are paid during the previous year" .

4.3.5 In the light of the above discussion, the contention of the appellant that provisions of sec. 40(a)(ia) of the I.T. Act are attracted only in respect of sums, which are 'payable' at the end of the year and not to sums which have already been paid during the year, has no merit and accordingly, rejected.

4.3.6 For the foregoing reasons, the AO is justified on facts and in law in invoking the provisions of sec.40(a)(ia) to the impugned payment to sub-contractors and the addition of Rs.1,45,11,384/- made by the AO on this ground does not call for any interference and the same is upheld. ***Grounds of appeal No. 1 and 2 are rejected.***

Aggrieved by the order of Ld CIT(A), assessee is now in appeal before us.

5. Before us, Ld AR reiterated the submissions made before lower authorities and further with respect to disallowance of Rs.1.45 crore (rounded off) submitted that the corresponding TDS relating to the contract amount of Rs.1.45 crore (rounded off) was deposited by the assessee on 15.10.2010 being the extended due date of filing the return of income. He submitted that the due date for filing of return of income for AY 2010-11 was extended upto 15.10.2010 by CBDT by order (F.No 225/72/2010/IT(A-II) dated 27.09.2010 and in support of which he placed on record the copy of the aforesaid circular. He further submitted that the cheque for TDS was deposited with the State bank of India on 15.10.2010 but it was cleared by the bank on 20.10.2010 and to support his contention that the cheque was deposited on 15.10.2010 he placed on record the certificate dated 06.05.2017 issued by State Bank of India to that effect. He however fairly admitted that the aforesaid certificate is an additional evidence which could not be furnished before the lower authorities but however prayed that it be admitted and

considered while deciding the issue. He also stated that he has no objection if the matter is sent back to AO for its verification. He further submitted that since the cheque was deposited on 15.10.2010 and the same was not dishonoured, it is to be presumed that the assessee has deposited the TDS on 15.10.2010 and in support of which he placed reliance on the decision of Hon'ble Apex Court in the case of CIT Vs Ogale Glass works Ltd. Reported in (1954) 25 ITR 529 (SC). He further submitted that Ld.CIT(A) has erred in coming to conclusion that the TDS was deposited on 20.10.2010. He therefore submitted that no disallowance u/s 40(a)(ia) of the Act is called for and the expense be allowed. Ld DR on the other hand took us through the order of AO and CIT(A). He pointing to the order of Ld.CIT(A) submitted that before Ld.CIT(A), assessee had raised the issue only with respect to disallowance of Rs 1.45 crore (rounded off) and with respect to the disallowance of Rs.79,51,844/- the issue was not before CIT(A) and to support his contentions, he pointed to the observation of Ld.CIT(A) at para 4.3 of his order. He therefore submitted that now before the Hon'ble ITAT, assessee cannot raise the issue with respect to disallowance of Rs.79,51,844/- as it does not arise from the order of Ld.CIT(A). As far as the disallowance of Rs 1.45 crore (rounded off) is concerned, he submitted that assessee had not placed the certificate of the bank dated 06.05.2017 in support of his contention that the cheque of TDS was deposited on 15.10.2010 and is being placed now which is in the form of additional evidence. He submitted that assessee has not demonstrated any reason for its inability to file the documents before lower authorities. He therefore submitted that the matter may be remitted to AO for verification. He thus supported the order of lower authorities.

6. We have heard the rival submissions and perused the material on record. The first ground and the additional ground raised by the assessee are with respect to disallowance of Rs.2,24,63,228/- and the same are considered together. The aforesaid disallowance consists of two parts namely, the first part being Rs 1.45 crore (rounded off) which was disallowed for the reason that the TDS on the corresponding amount of sub-contract payments was not deposited before the due date of filing the return of income and the second part of Rs.79.51 lacs (rounded off) of sub-contract payments were disallowed for the reason that though the TDS on such sub-contract payments were deducted but the same were not deposited at all. With respect to the issue of disallowance of Rs.79.51 lacs, we find that Ld CIT(A) while deciding the issue has, in para 4.3 (page 8) of the order, noted that the dispute raised by the assessee was only with respect to Rs.1.45 crore (rounded off). He thereafter proceeded to decide the matter with respect to disallowance of Rs.1.45 crore. The aforesaid observation of the CIT(A) has not been controverted by assessee and therefore in such a situation we are of the view that though the assessee has raised the ground before us with respect to disallowance of Rs.2,24,63,228/- which includes disallowance of Rs.79,51,844/- but issue with respect to Rs.1.45 crore (rounded off) only arises out of the order of Ld CIT(A) and therefore we restrict ourself to decide the issue only with respect to the disallowance of Rs.1.45 crore (rounded off). Rs. 1.45 crore (rounded off) was the amount that was disallowed u/s 40(a)(ia) of the Act for the reason that the TDS corresponding to the sub-contract payments was not deposited by the assessee before the due date of filing the return. Before us, it is Ld AR's contention that the due date for filing the return of income for AY 2010-11 was extended by CBDT upto 15.10.2010 and the assessee had

deposited the TDS on 15.10.2010 and therefore the deposit of TDS was within the prescribed time limit. Before us it is assessee's contention that when the cheque of TDS has been deposited on 15.10.2010 and when the same was not dishonoured, the date of payment i.e., 15.10.2010 has to be considered as the date of deposit. We find force in the aforesaid contention of the assessee more so when the CBDT had extended the due date of filing of return for A.Y. 2010-11 to 15.10.2010. It is also a fact that the cheque of TDS deposited by the assessee on 15.10.2010 has not been dishonoured by the Bank. We therefore hold that deposit of TDS by cheque would be deemed to have been made on the date of deposit of the cheque, if it is not dishonoured and for our aforesaid conclusion, we draw support from the decision of Hon'ble Apex Court in the case of Ogale Glass Works (supra). Before us, Ld AR has placed on record the copy of certificate issued by State Bank of India wherein it is certified that though the amount of TDS was deposited on 15.10.2010 but the amount was debited to the bank account of the assessee only on 20.10.2010. The aforesaid certificate has not been placed by the assessee before the lower authorities and therefore there is no finding on it by the lower authorities. Considering the totality of the aforesaid facts, we are of the view that the matter needs verification of the facts at the end of AO. In case on verification, the contention of the assessee of the deposit of cheque on 15.10.2010 and the debit of it to the assessee's bank account on 20.10.2010 is found correct, the AO is directed to delete the disallowance made u/s 40(a)(ia) of the Act. **Thus, the ground of assessee is partly allowed for statistical purposes.**

7. Ground No 2 is with respect to disallowance of Rs.13,10,000/- on account of purchase of marbles:

7.1. During the course of assessment proceedings and on perusing the details, AO noticed that during the year assessee had debited Rs.13,10,000/- towards purchase of marbles. The assessee was asked to justify the expenses more so when the assessee was in the road construction business and there was no requirement of marbles in road construction. Assessee inter-alia submitted that assessee gets contracts for road construction from Enercon and that the marbles was used as flooring material at the Enercon Office building. AO obtained copies of the cheques issued by the assessee for purchase of material. He noticed that the cheques issued for purchase of marbles were bearer cheques. He recorded the statement of the persons whose names and addresses which were at the back of the cheque and who have been stated to have received the payments. AO noted that the persons in their statement had submitted that the signature at the back of the cheque were not their signature, they had not sold any material to the assessee and the stamp on the back of the cheque were also not of their business establishment. AO confronted the assessee with these findings and to which no satisfactory explanation was offered by the assessee. AO also noted that no proof of receipt of contract or proof form Enercon for fixing the marbles were furnished by the assessee. He accordingly considered the expense of Rs.13,10,000/- as bogus purchases and added to the income. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO by observing as under:

> *"6.3 The various contentions raised by the Ld. Counsel for the appellant are carefully considered in the light of the facts of the case and the enquiries conducted by the Assessing Officer in the course of the assessment proceedings. The main contention of the appellant in this regard is that the expenditure of marble though not mentioned in the work order was incurred out of commercial expediency and to maintain cordial relations with the contractees and therefore the same is an allowable expenditure u/s 37 of the I.T. Act. It is also argued that the appellant was not given an opportunity to cross examine the supplier~ of marble before*

the statement of the parties recorded by the Assessing Officer was used as evidence against the appellant. These arguments of the appellant are devoid of any merit. Firstly, the payments for alleged purchase of marble were made by bearer cheques and copies of these cheques obtained by the Assessing Officer from the bank concerned revealed that at the back of the cheque some third party has signed and received cash from the bank. The parties, in whose name the bearer cheques were issued by the appellant, have dearly deposed on oath that the signature at the back of the cheque and the stamp affixed therein are not of their business or their associates. The persons have also stated on oath that they have neither en- cashed the cheques from the bank nor received the amount from the third parties who presented the cheque to the bank and received the amount. The statements of the parties clearly prove that the expenditure in question on marble is not genuine and fictitious expenditure was booked in the name of alleged suppliers of marble and amounts were received back by encashment of bearer cheques issued in the name of said parties. Even presuming for a while that purchases of marble were really made from the said parties, the expenditure cannot said to have been incurred wholly and exclusively for the business of the appellant as the nature of work undertaken by the appellant i.e. road widening work etc. does not involve expenditure on marble and the contract document or work order also does not indicate that the work is of such a nature that it requires purchase of marble. Even otherwise the appellant has not produced any evidence such as certificate from the agency M/s. Enorcom that the marble was used for flooring of office building of the M/s. Enorcom at Deogaon, Ranjangaon, Agadgaon etc. to substantiate its claim that the expenditure was incurred out of business exigencies though it does not form part of the contract work being executed by the appellant.

6.3.1 With regard to the request of the appellant to afford an opportunity for cross examination of the alleged Suppliers of marble by the appellant, the same cannot be acceded to at this stage as the appellant has never asked for cross-examination of the said arties during the assessment proceedings. Even otherwise the right of cross-examination is not automatic, but it would be incumbent only in a situation where the appellant is able to prima facie demonstrate that the onus cast on him to establish his version of affairs is based on primary evidence. In this case, as already mentioned the appellant had failed to lead any primary evidence that marble was actually supplied by the parties and the bearer cheques were issued at the insistence of the parties and the same were en-cashed by the parties and therefore it is not incumbent in the present case to afford an opportunity to the appellant to cross examine the parties at this stage.

6.3.2 Without prejudice to the above that the expenditure itself is not genuine, it is to be mentioned that since the payments for alleged purchases of marble were made by bearer cheques, the payments in question are hit by provisions of sec. 40A(3). For the elaborate reasons mentioned while dealing with payments to sub-contractors by bearer cheques in the preceding Paras, the expenditure is otherwise liable to be disallowed u/s 40A(3) of the I. T. Act.

6.3.3 In view of the above, the Assessing Officer is justified in disallowing the expenditure of Rs.13,10,000/- claimed by the appellant on purchase of marble and the addition made on this ground does not warrant any interference and the same is upheld. Grounds of appeal No. 4 and 5 are rejected."

Aggrieved by the order of Ld.CIT(A), assessee is now before us.

8. Before us, Ld AR reiterated the submissions made before AO and Ld.CIT(A). He further submitted that the expenditure was incurred on account of commercial expediency, the payments were made by cheques and that the AO had not granted opportunity to cross examine the persons on the basis of which he concluded that the payments were bogus. He therefore submitted that the expenditure be allowed. Ld DR on the other hand, took us through the findings of Ld.CIT(A) and supported the order of CIT(A).

9. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance of the expenses incurred for purchase of marbles which were considered by AO to be bogus expenses. We find that Ld.CIT(A) while upholding the order of AO has given a finding that that the payment for marbles were made through bearer cheques, the parties in whose names the cheques were issued had deposed on oath that the signature at the back of the cheque and the rubber stamp were not of their business establishment, they have neither encashed the cheques from the bank nor received the amount from third parties who presented the cheques to the bank and received the amount. He has also noted that assessee had not furnished any evidence to prove that the marble was used in the office of Enercon for the flooring of the office building to prove the business exigency. He has further noted that the opportunity for cross examination was never asked by the assessee during the assessment proceedings. Before us, assessee has not controverted the findings of Ld CIT(A) and therefore we find no reason to interfere with the order of Ld.CIT(A) and thus **the ground of assessee is dismissed.**

10. Third ground is with respect to disallowance of Rs.22,75,000/- (though stated in the grounds as Rs.12,75,000/-)

10.1 AO during the course of assessment proceedings noticed that assessee had claimed expenses of Rs.1,40,10,804/- under various head of expense. AO issued summons to some of the persons to whom the assessee had stated to have made the payments (the list of persons are tabulated on page 13 of the assessment order). AO noted that all those persons in their statement recorded on oath have stated that the signatures at the back of the cheques were not their signatures and that they have not received any amount as mentioned in the cheques. AO noted that when assessee was confronted, he did not comment on it. AO therefore treated the amount of Rs.22,75,000/- which were paid by assessee to such 5 persons as bogus expenditure and disallowed the same. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO by observing as under:

> *"7.3 The arguments canvassed by the appellant are carefully examined in the light of the facts of the case and the findings in the assessment order. Firstly, the payments in question were made by bearer cheques and copies of these cheques obtained by the Assessing Officer from the bank concerned revealed that at the back of the cheque some third party has signed and received cash from the bank. The parties, in whose name the bearer cheques were issued by the appellant, have clearly deposed on oath that the signature at the back of the cheque and the stamp affixed therein are not of their business or their associates. The persons have also stated on oath that they have neither en-cashed the cheques from the bank nor received the amount from the third parties who presented the cheque to the bank and received the amount. statements of the parties clearly prove that the expenditure in question is not genuine and fictitious expenditure was booked in the name of alleged suppliers of material and amounts were received back by encashment of bearer cheques issued in the name of said parties. As regards the request of the appellant to afford an opportunity for cross-examination of the parties by the appellant, the same cannot be acceded to at this stage as the appellant has never asked for cross-examination of the said parties during the assessment proceedings. Even otherwise the right of cross-examination is not automatic, but it would be incumbent only in a situation where the appellant is able to prima facie demonstrate that the onus cast on him to establish his version of affairs is based on primary evidence. In this case, the appellant had failed to lead any primary evidence that the bearer cheques were issued at the insistence of the parties and the same were en-cashed by the parties and therefore it is not incumbent in the present case to afford an opportunity for cross examination to the appellant.*

7.3.1 Without prejudice to the above that the expenditure itself is not genuine, it is to be mentioned that since the payments for alleged purchases were made by bearer cheques, the payments in question are hit by provisions of sec.40A(3). For the elaborate reasons mentioned while dealing with payments to sub-contractors by bearer cheques in the preceding paras, the expenditure is otherwise liable to be disallowed u/s.40A(3) of the I.T.Act.

7.3.2 Thus, the Assessing Officer is justified on facts and in law in disallowing' the said expenditure of Rs.22,75,000/- in respect of which' payments were made by bearer cheques and the cheques were en-cashed by third parties and the addition made by the Assessing Officer on this ground is upheld. Ground of appeal No.6 fails."

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us.

11. Before us, Ld AR reiterated the submissions made before AO and Ld.CIT(A) and submitted that the expenses have been incurred during the course of business and therefore the same should be allowed. Ld DR on the other hand took us through the findings of Ld.CIT(A) and supported the order of Ld.CIT(A).

12. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance of the expenses by considering it to be bogus. We find that Ld.CIT(A) while upholding the order of AO has given a finding that that the parties in whose names the cheques were issued had deposed on oath that the signature at the back of the cheque and the rubber stamp were not of their business establishment, they have neither encashed the cheques from the bank nor received the amount from third parties who presented the cheques to the bank and received the amount. Before us, assessee has not controverted the findings of Ld CIT(A) and therefore we find no reason to interfere with the order of CIT(A) and thus **the ground of assessee is dismissed.**

13. Ground No.4 is with respect to adhoc disallowance of Rs.5,08,290/-.

13.1 AO noted that assessee had claimed expenses of Rs.1,40,10,804/-. AO noted in the absence of bills, vouchers for the expenses, the balance expenses of Rs.1,01,65,804/- (after reducing the bogus expenses disallowed by him) cannot be allowed in full. He accordingly disallowed 10% of the balance expenses and thus disallowed Rs.10,16,850/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who granted partial relief to the assessee by observing as under:

> *"8.3 The submissions made by the Ld. Counsel are carefully examined with reference to the nature of expenses and the findings in the assessment order. The contention of the appellant in this regard is that the ad-hoc disallowance was made by the Assessing Officer without possessing cogent evidence or the reason particularly when the books of account are subjected to audit u/s.44AB. In the course of the assessment proceedings, as recorded by the Assessing Officer, except diesel bill for expenditure of Rs. 2,60,000/-, the appellant has not produced books of accounts/bills/ vouchers for the balance expenses of Rs.1,01,65,804/- and 10% of the expenditure was disallowed. While doing so, nothing is brought on record by the Assessing Officer to show that the expenditure incurred on account of material, sand, labor expenses etc. is excessive or unreasonable having regard to the receipts declared by the appellant in this year or there is disproportionate increase as compared to the expenses claimed under this head in the earlier years. In these circumstances, the disallowance made by the Assessing Officer at 10% of the impugned expenditure of Rs. 10,16,580/- is excessive or unreasonable. At the same time, considering the fact that the payments in some cases were made by bearer cheques as discussed earlier and in some cases supported by only self- made vouchers, which are not amenable to independent verification, it would meet the ends of justice, if the disallowance is restricted to 50% of the disallowance made by the Assessing Officer. Accordingly, out of the total disallowance made by the Assessing Officer of Rs. 10,16,580/- on this ground, disallowance to the extent of Rs, 5,08;290/- is sustained. The appellant gets consequential relief of Rs. 5,08,290/-.* ***Ground of appeal No. 7 and 8 are partly allowed."***

Aggrieved by the order of CIT(A), assessee is now in appeal before us.

14. Before us, Ld AR reiterated the submissions made before AO and CIT(A) and further submitted that in the absence of any tangible

material, AO had wrongly disallowed the expenses on adhoc basis. He therefore submitted that the expense be allowed. Ld DR on the other hand supported the order of AO.

15. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to adhoc disallowance. AO disallowed 10% of the expenses for the reason that assessee did not produce evidence for the incurring of expenses. Ld CIT(A) granted partial relief and directed that the disallowance be restricted to 5% and thus upheld the disallowance to the extent of Rs.5,08,290/. We find that Ld.CIT(A) has noted that the books of accounts of the assessee are audited and no adverse remarks have been noted by the auditor and the books of accounts of the assessee has not been rejected by the AO. Further, the AO has not pointed out the expenditure are not for the purpose of business. Further the expenses which were found to be bogus were disallowed by AO and has also been upheld by us herein above. In view of these facts, we are of the view that no disallowance out of the balance expenses, on adhoc basis is called for in the present case. We thus direct the deletion of addition made on adhoc basis. **Thus, the ground of assessee is allowed.**

16. **In the result, the appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on the 11th day of April, 2018.

Sd/-	**Sd/-**
(**VIKAS AWASTHY**)	(**ANIL CHATURVEDI**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 11th day of April, 2018.
Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-2, Pune / CIT (A) concerned.
4. Pr.CIT-1, Pune / CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.