IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

Srl	Appeal Number	PAN	A.Y.	Appellant	Respondent
1	ITA 1132 /Hyd/ 2017	AAKCS 5870P	2007-08	ASR Engineering & Projects Limited (formerly Sai Sudhir Infrastructures Limited), Hyderabad	DCIT, Cent. Circle-1(3), Hyderabad
2	ITA 1133 /Hyd/ 2017		2008-09		
3	ITA 1134 /Hyd/ 2017		2009-10		
4	ITA 1135 /Hyd/ 2017		2010-11		
5	ITA 1136 /Hyd/ 2017		2011-12		
6	ITA 1382 /Hyd/ 2017		2009-10	DCIT, Cent. Circle-1(3), Hyderabad	Sai Sudhir Infrastrutures Limited, Hyderabad
7	ITA 1383 /Hyd/ 2017		200-11		
8	ITA 1384 /Hyd/ 2017		2011-12		
9	ITA 1385 /Hyd/ 2017		2012-13		
10	ITA 222 /Hyd/ 2019		2009-10	DCIT, Central Cirle-1(3), Hyderabad	ASR Engineering and Projects Limited, Hyderabad
11	ITA 223 /Hyd/ 2019		2010-11		
12	ITA 224 /Hyd/ 2019		2011-12		
13	ITA 225 /Hyd/ 2019		2012-13		
14	ITA 226 /Hyd/ 2019		2012-13		
APPEALS OF SUB CONTRACTORS					
15	ITA 1390 /Hyd/ 2017	BDNPK 4668M	2008-09	M. Krishna Reddy, Kurnool	DCIT, Central Circle-1(3), Hyderabad
16	ITA 1391 /Hyd/ 2017		2009-10		
17	ITA 1392 /Hyd/ 2017		2010-11		
18	ITA 1393 /Hyd/ 2017		2011-12		
19	ITA 1359 /Hyd/ 2017		2008-09	DCIT, Caentral Circle-1(3), Hyderabad	M. Krishna Reddy, Kurnool
20	ITA 1360 /Hyd/ 2017		2009-10		
21	ITA 1361 /Hyd/ 2017		2010-11		
22	ITA 1362 /Hyd/ 2017		2011-12		
23	ITA 1408 /Hyd/ 2017	AORPB 5168D	2008-09	B. Narasimha Reddy, Kurnool	DCIT, Central Circle-1(3), Hyderabad
24	ITA 1409 /Hyd/ 2017		2009-10		
25	ITA 1410 /Hyd/ 2017		2010-11		
26	ITA 1411 /Hyd/ 2017		2011-12		
27	ITA 1351 /Hyd/ 2017	ABGFS 7670B	2008-09	DCIT, Central Circle-1(3), Hyderabad	Sushi Udyog Construction Company, Secunderabad
28	ITA 1352 /Hyd/ 2017		2009-10		
29	ITA 1353 /Hyd/ 2017		2010-11		
30	ITA 1354 /Hyd/ 2017		2011-12		
31	ITA 1399 /Hyd/ 2017		2008-09	Sushi Udyog Construction Company, Secunderabad	DCIT, Central Circle-1(3), Hyderabad
32	ITA 1400 /Hyd/ 2017		2009-10		
33	ITA 1401 /Hyd/ 2017		2010-11		
34	ITA 1402 /Hyd/ 2017		2011-12		
35	ITA 1368 /Hyd/ 2017	AFXPR 7622A	2009-10	DCIT, Central Circle-1(3), Hyderabad	S. Janardhan Reddy, Hyderabad
36	ITA 1369 /Hyd/ 2017		2010-11		
37	ITA 1405 /Hyd/ 2017		2009-10	S. Janardhan Yadhav Reddy, Hyderabad	DCIT, Central Circle-1(3), Hyderabad
38	ITA 1406 /Hyd/ 2017		2010-11		
39	ITA 1366 /Hyd/ 2017	AAIFP 4192N	2007-08	DCIT, Central Circle-1(3), Hyderabad	Prasad Reddy & Company, Hyderabad
40	ITA 1367 /Hyd/ 2017		2010-11		
41	ITA 1397 /Hyd/ 2017		2007-08	Prasad Reddy &	DCIT, Central Circle-

42	ITA 1398 /Hyd/ 2017		2010-11	Company, Hyderabad	1(3), Hyderabad
43	ITA 1363 /Hyd/ 2017	ADTPA 7271R	2009-10	DCIT, Central Circle-1(3), Hyderabad	A.Chandrakanth Reddy, Hyderabad
44	ITA 1364 /Hyd/ 2017		2010-11		
45	ITA 1365 /Hyd/ 2017		2012-13		
46	ITA 1394 /Hyd/ 2017		2009-10	A.Chandrakanth Reddy, Hyderabad	DCIT, Central Circle-1(3), Hyderabad
47	ITA 1395 /Hyd/ 2017		2010-11		
48	ITA 1396 /Hyd/ 2017		2012-13		
PENALTY APPEALS					
49	ITA 1316 /Hyd/ 2016	ABGFS 7670B	2008-09	Sushi Udyog Construction Company, Secunderabad	DCIT, Cent Cir-6, Hyderabad
50	ITA 1317 /Hyd/ 2016		2011-12		
51	ITA 1318 /Hyd/ 2016		2010-11		
52	ITA 1319 /Hyd/ 2016		2009-10		
53	ITA 1320 /Hyd/ 2016	ADTPA 7271R	2009-10	Chandrakanth Reddy Ankilla, Hyderabad	DCIT, Cent Cir-6, Hyderabad
54	ITA 1321 /Hyd/ 2016		2010-11		

Assessee by : Shri S. Rama Rao
Revenue by : Shri Y.V.S.T. Sai

Date of hearing : 31/07/2019 & 01/08/2019
Date of pronouncement : 30/08/2019

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

All these appeals filed by the assessees and revenue are having common issues, therefore, these appeals were clubbed and heard together. For the sake of convenience, a consolidated order is passed.

ITA Nos. 1132 to 1136/Hyd/2017 for AYs 2007-08 to 2011-12 by assessee and 1382 to 1385/Hyd/2017 [against order u/s 143(3) rws 153A] & and 222 to 226/Hyd/2019 [against consequential order giving effect to CIT(A)'s order] for AYs 2009-10 to 2012-13 by the revenue.

2. The above appeals are cross appeals by both Assessee and Revenue and are filed against common order dated 30-03-2017, passed by the PCIT (A) - 11, Hyderabad. These appeals are being disposed by a common and consolidated order for the sake of convenience, because of common issues and identical submissions.

2.1 The assessee company, not being one in which public are substantially interested, is in the business of execution of contracts relating to infrastructure projects. Search and seizure operations u/s. 132 of the I.T.

Act were conducted in the case of the assessee on 30/11/2011. Particulars of income originally returned, income returned in response to notice u/s.153A dated 05/12/2012 (for A.Yrs. 2006-07, to 2011-12), and income assessed, are tabulated as under:

S.No.	AY	Original return of income u/s 139(1)			Return filed u/s 153A		
		Date of filing	Income returned (Rs.)	Income assessed (Rs.)	Date of filing	Income returned (Rs.)	Income assessed (Rs.)
1	2006-07	11/12/06	14381022	16183590	14/02/13	16183590	16183590
2	2007-08	30/10/07	30270520	32253520	14/02/13	32253520	100662648
3	2008-09	30/09/08	116365140	-	14/02/13	116365140	325778267
4	2009-10	30/09/09	389144809	-	14/02/13 (revised on 06/02/14)	392330310 (revised to 160886990	744975993
5	2010-11	15/10/10	524622770	-	14/02/13 (revised on 05/02/14)	524622770 (revised to 359066330)	1352080062
6	2011-12	30/09/11	910702200	-	14/02/13 (revised on 06/02/14)	910702200 (revised to 672493230)	1068117808
7	2012-13	30/09/12 (revised on 06/02/14)	796243160 (revised to 359725919	798243160	-	-	-

2.2 The AO observed from the respective assessment orders that the returns filed in response to notice u/s.153A by the assessee did not incorporate an admission of income that was made earlier during the course of Search proceedings. Details are as under:

AY	Admitted Amount (Rs. In crores)
2008-09	6.57
2009-10	8.33
2011-12	15.08
2012-13	3.18

2.3 It is also seen from the assessment orders that in AYrs. 2009-10 to 2012-13 deduction u/s.80IA was not claimed in the returns of income originally filed u/s. 139(1). The claim for deduction was introduced for the first time by the revised returns filed in response to Notice u/s.153A. The details are as under:

AY	Claim u/s 80IA (Rs.)
2009-10	22,77,14,046
2010-11	22,50,21,666
2011-12	27,87,49,136
2012-13	35,97,25,919

2.4 The two common aspects of the above assessments are firstly, disallowance of expenditure claimed as payments to sub-contractors in A.Yrs. 2007-08 to 2011-12, and secondly, rejection of claim of deduction u/s.80IA for A.Yrs. 2009-10 to 2012-13. The facts noticed in the assessment, briefly, are as under.

3. The assessee in the course of its business operations of executing various civil contracts, recorded expenditure claimed to be on account of payments made to subcontractors. The Assessing Officer, relying on the findings of the Search, identified significant improbabilities in the expenditure claimed by way of execution of contract works allotted to M/s. Spectrum Infrastructures Ltd (represented by Sri A. Chandrakanth Reddy), M/s. Sushi Udyog Construction Company (Prop. Sri S.]anardhan Reddy) and M/s. J.K. Enterprises (represented by Sri S. Janardhan Reddy). Similar features were noticed in payments made to M/s. Gee Constructions, M/s. Surya Erectors, M/s. Prasad Reddy & Co, M/s. Siri Engg. & Enterprises, Sri B. Narasimha Reddy, Sri M. Krishna Reddy and Sri T. Srinivas. The Assessing Officer noted that RTGS payments made by the assessee-company to these parties was immediately withdrawn - in cash, by employees of the assessee company (and not the payee), at the instance of the Managing Director or CFO of the assessee company.

3.1 The assessee objected to the Assessing Officer's proposal for the disallowance by stating that the expenses included payments for sub-contracted work actually executed by downstream parties as well as payments for material really purchased. In so far as execution of work is concerned, it was stated that a part of the work was executed by the assessee while the other part of it was entrusted to the sub-contractors, with whom agreements were entered into. The bills raised upon execution of the work were verified and paid for by the principal, which shows that work was actually executed. The contractors acknowledged the receipt by admitting it in their returns of income and claimed the TDS that was duly deducted. Regarding the withdrawal of cash, it is claimed that employees of the assessee company merely facilitated the withdrawal of cash by the sub-contractor. It was also claimed that the profit margin disclosed by the assessee was equal to, or more than the industry average, which

suggested that there was no inflation of expenditure. Regarding supply of material it was submitted that there was no justification for the proposed disallowance because the assessee depended upon other parties for supply of material at the Paradeep Site in Orissa and that the genuineness of the expenditure stands established by the entries in the books of account, the robust profit margins accounted for, and the execution of the work as evidenced by the fact of payments received from the principal.

3.1 The Assessing Officer disagreed with the assessee by holding that the parties lacked the credentials to execute the work, and that the bank transactions with, and tax deduction at source from payments made to these entities, was merely an attempt to give the transactions the colour of genuine transactions. Payments recorded in the names of various entities from A.Y. 2007-08 to 2011-12 was, therefore, disallowed as under:

S.No.	Payment made to	AY				
		2007-08	2008-09	2009-10	2010-11	2011-12
1.	Prasad Reddy & co.	67611858	-	-	-	-
2.	T. Srinivas	797270	10045741	19785257	82842331	33633072
3.	Sushi Udyog Const.	-	98123862	70614926	127123160	112238997
4.	Gee Constructions	-	3855810	26892814	50980547	-
5.	Surya Erectors	-	24716736	29463528	61773861	-
6.	Siri Engineering	-	53056543	-	-	700780
7.	B. Narasimha Reddy	-	14734987	31982865	21392182	5311942
8.	M. Krishna Reddy	-	4879448	48530826	27563398	5530817
9.	Spectrum Engg.	-	-	69606528	334685297	-
10.	J.K. Enterprises	-	-	59518213	1210966626	-
	Total	68409128	209413127	356394957	827457402	157415608

4. In respect of assessment years 2009-10 to 2012-13 the Assessing Officer noticed that a claim for deduction u/s.80IA was introduced for the first time in the course of proceedings initiated u/s.153A. He noticed that no claim was made initially in the return filed u/s.139(1). He further noticed that this claim was not made even in the return filed on 14/02/2013 in response to notice u/s.153A dt. 05/12/2012. This claim was made in the course of a 'revised return' filed on 06/02/2014. He also noticed that the notice u/s. 153A called for the return to be filed by 09/01/2013 whereas it was filed 36 days later on 14/02/2013. On both counts, therefore, the Assessing Officer held that the claim u/s.80IA was belated and hence invalid. He further held that the revised return filed on 06/02/2014 was no return of income, since Section 153A did not provide for revision of returns.

In response, the assessee submitted that Section 153A(1)(a) provided for treating a return filed u/s.153A as if it was a return filed u/s.139(1). Being so, the assessee possessed the rights vested in terms of Section 139(5). It was further submitted that wherever the Act intended to deny such right it was specifically stated - as for example in the second proviso below Section 158BC(a). It was also pointed out that there was no statutory time limit provided under the Act for filing a return u/s.153A. On an analogy, the assessee relied upon the case of ITO v. Banarsilal Satyanarain (1995) 55 ITD 372 (Patna) which held that a return filed in response to a notice u/s.148 can be validly revised u/s.139(5). The assessee also relied on ACIT Vs. Cavikare (P) Ltd (2009), 120 ITD 126 (Chennai) to suggest that Section 139(5) is partly substantive and partly procedural in nature and, therefore, the right given to the assessee under this sub-section should be extended to a return filed in response to notice u/s. 148 also, because even such returns can contain omissions that warrant correction. The Assessing Officer disagreed, holding the claim to be belated, technically invalid, as well as factually incomplete, and did not take cognizance of the claim u/s 80IA in determining assessable income.

5. Aggrieved by the order of AO, the assessee preferred appeals before the CIT(A).

6. With regard to the first issue relating to disallowance of expenditure recorded as sub-contract payments in AYrs. 2007-08 to 2011-12, the ld. AR of the assessee submitted as under:

> *"a) There is no material available during the course of search to show that the sub contract payments are not genuine.*
>
> *b) The assessee entered into an agreement with the sub contractors. Almost the entire work was entrusted to the sub contractors.*
>
> *c) The work was entrusted to the assessee as per agreement and the work was completed*
>
> *d) There is no evidence to show that the amount paid by the assessee was received back by the company.*
>
> *e) The sub contractors filed affidavits. The departmental authorities seem to have examined the sub contractors and they confirmed the*

fact that they have carried out the sub contract work entrusted to them.

f) The sub contractors filed the returns of Income and admitted the receipt in the returns filed by them. They filed the returns of Income and the assessments were completed.

g) Tax was deducted at source at the time of payment and the said TDS was paid in time.

h) The TDS amount was claimed by the sub contractors in the return of income filed.

i) Besides, the work entrusted to the assessee was completed; bill was raised against the principal contractor and the same was passed after inspection of the work done. These facts clearly indicate that the work was done. There is no evidence on record that the work was not executed The principal contractor accepted the bill and paid the amount

J) if the said payment is disallowed the profit derived by the assessee is working out to more than 95%.

The assessee in this regard, may be permitted to refer to the decision of the Hon'ble ITAT, Hyderabad in the case of DCIT vs, KNR Constructions Pvt Ltd. In the said case, the concern made payments to the sub contractors. The Assessing Officer was of the view that certain payments were not genuine. The CIT(A) found that the works were actually completed; all the payments were offered to tax by the sub contractors. If such disallowance is accepted the profit rate would be 19%. It was also found that the said company had a sub contract agreement and the work as per the sub contract agreement was found completed. In such circumstances, the CIT(A) held that the disallowance is not justified. The Department filed an appeal before the Hon'ble ITAT and the Hon'ble ITAT confirmed the order passed by the CIT(A). Similar are the circumstances in the case of the assessee

In the case of assessee, the assessee received the amount from other companies on sub contract basis. 95% of the work was given on sub contract to outsiders. If such sub contract payments were to be disallowed, the net profit from the said activity would be about 95%. Therefore the assessee submits that the facts of the case decided by the Hon'ble ITAT are applicable to the facts of the assessee

The Hon'ble High Court of Rajasthan in the case of CIT vs. Consulting Engineering Group Ltd, reported in 365 ITR 284 observed that when the Assessing Officer is not satisfied about the accounts of the payments made to the sub contractors, the disallowance of expenditure or increase in profits on estimate basis may be made in the hands of the sub contractor and not in the hands of the assessee.

The assessee further submits that during the course of search and seizure operations, the authorities recorded the statement of Sri D.Sreedhar Reddy, Managing Director of the company He filed an affidavit before the Hon'ble CIT(A) retracting from the declaration made by him at the time of search. It is submitted that search was commenced on 30.11.2011 and continued till 01.12.2011. The statement u/s. 132(4) also continued on 01.12.2011. Copies of the statements were provided to the assessee only on 05.01.2015 The assessee submits that the statement was recorded at the odd hours. As copy was supplied only on 0501.2015 there was no possibility to retract from the statements made earlier.

It is further submitted that even on facts as narrated above, the admission is not correct Therefore, the retraction of the admission may be accepted and the additions made by the Assessing Officer may kindly be deleted. The assessee submits that such a declaration is not based on any material found during search. Further, the facts explained above would indicate that such an addition cannot be made."

7. The CIT(A) noted that the contention of the assessee emerging from the above is basically two-fold. Firstly, the Search did not yield any evidence that the sub-contract payments were 'bogus' in nature or that the amounts were received back by the company, and Secondly, that the internal details of the transaction such as agreements entered into with sub-contractors, tax returns filed by the sub-contractors, and tax deduction made on payments to the subcontractors, would evidence the genuineness of the claim. These submissions were considered carefully.

7.1 The CIT(A) observed that a careful perusal of the assessment order and the search related details found in the records of the Assessing Officer bring out the following features that are relevant to understand the nature and quality of the expenditure booked by the assessee.

“7.1.1 A statement was recorded from Sri D. Sreedhar Reddy, the M.D of the assessee Company, where inter alia the following was noticed in respect of two persons recorded in the books of the assessee Company as sub-contractors:

"18. During the course of Search & Seizure operation u/s 132 today- it is seen from the books of accounts that SSIL, has paid the following amounts in F.Y 2007-08 to 2010-11 to M/s Sushi Udyog Constructions Company on sub-contract basis.

Financial Year	*Amount Rs.*
2007-08	*9,81,23,862*
2008-09	*7,06,15,319*

2009-10	*12,52,31,641*
2010-11	*10,75,25,000*

As per your records the address of M/s Sushi Udyog Constructions Company is No.21,1st Floor, Madhuvan Complex, Highway way Road, Mehsana-384 002. Today, on verification, it has come to the notice of the Department that the above concern does not exist at the given address which was occupied by a Gas Agency for more than 20 years. Please explain the nature of work supposed to have been executed by M/s Sushi Udyog Constructions Company and where it is available?

Ans. I would like to state that M/s Sushee Udyog Constructions Company is firm represented by Sri Janardhan Reddy, Partner. They have approached us for sub contract works. In the process we have examined their capabilities in execution of works and found satisfactory based on that we have given sub contract to M/s Sushee Udyog Constructions Company after obtaining PAN card Earlier, they have executed works in Gujarat and JSVV, Hospet. Based on their execution capabilities, we have entrusted few sub-contracts to M/s Sushee Udyog Constructions Company

19. In which sites M/s Sushee Udyog Constructions Company executed works and what is the nature of work

Ans: At Paradeep port, Orissa, construction of berths IOCL, water supply project at Kolar and Chitapuri project at Hyderabad.

20. Do you have any evidence to show that M/s Sushee Udyog Constructions Company executed works at the above sites.

Ans: Yes, M/s Sushee Udyog Constructions Company submitted RA bills to us. [EMPHASIS ADDED)

21. During the course 'of Search & Seizure operation u/s 132 today, it is seen from the books of accounts that SSIL, has paid the following amounts in F. Y 2008-09 to 2010-11 to MIs Spectrum Infrastructure on sub-contract basis.

Financial Year	*Amount*
2008-09	*6.96 crores*
2009-10	*33.46 crores*
Total	*40.42 crores*

As per your records the address of M/s Specrtrum Infrastructure is 8-1-363/20, Aditya Nagar Colony, Shaikpet, Hyderabad Today, on verification, it has come to the notice of the Department that the above concern does not exist at the given address which is a small residential house and no business activities are carried out there. Please explain the nature of work supposed to have been executed by M/s Specturm Infrastructure and where it is avaIlable?

Ans. I would like to state that M/s Spectrum Infrastructure is a proprietary concern of Mr. A. Chandrakanth Reddy He has approached us for sub contract works. In the process we have examined his capabilities in execution of works and found satisfactory. Based on that we have given sub contract to M/s Spectrum Infrastructure after obtaining PAN card.

22. In which sites M/s Sushee Udyog Constructions Company executed works and what is the nature of work

Ans: The basic records are maintained. I will submit the same later.

7.2 The CIT(A) observed that it would appear from the above that both 'sub-contractors' - to whom substantial works were allegedly assigned, were not found at the address as per the records of the assessee, even as on 30/11/2011. It was claimed that works were entrusted to them based on their execution capabilities, and the fact that they possessed a PAN. The details of the basis on which the execution capabilities of such persons was assessed, is not available. The credibility of these persons having execution capabilities to handle multi-crore contracts is not borne out by their profile as would be apparent from the ensuing paragraphs.

7.3 He observed that subsequent to the Search, and after much persuasion, Sri S. Janardhan Reddy, who operated the bank account of Sushi Udyog Construction Co. and J.K. Enterprises, two of the main 'sub-contractors' of the assessee company, was made available for examination. A statement was recorded u/s.131 of the I.T. Act on 13/01/2012, 11/02/2012 and 27/02/2012. It emerges from this examination that Sri S. Janardhan Reddy does not have any office. He is a man of modest means with no immovable properties, and no investments. He claims to have earned income from labour contact works done in the name of Sushi Udyog Construction Company, and J.K. Enterprises. It would appear that these two entities executed work only for the assessee company. Sushi Udyog Construction Company is claimed to be a partnership firm comprising of Sri Janardhan Reddy and nine other persons who are claimed to be friends but whose Whereabouts are not known. He further stated that the other partners upon being contacted, refused to give their postal address or depose before I.T. Authorities. It is not clear why Sri janardhan Reddy having admittedly managed to contact them, could not himself furnish the contact details. He further stated that he and the other

nine unidentified partners invested about Rs.23 lakhs in Sushi Udyog Construction Company which was sourced out of cash loans taken from family members, and repaid after 8-9 months, again in cash. However, it is seen from the cheques issued by Sushi Udyog Construction Company that Sri Janardhan Reddy is known to the Banks as proprietor of Sushi Udyog Construction Company, as seen from the stamp.

7.4 The CIT(A) observed that Sri Janardhan Reddy claimed to have been in the labour contract business since 2006 prior to which he claimed to have done some labour works in Mehsana, Gujarat for Nagarjuna Constructions Company for about 8 -10 months. It is clarified that the value of the works executed was about Rs. 6 lakhs, and that too not on contract basis but on weekly payment basis. Before that he claimed to be a site supervisor at Tirunelveli for MIs Sree Lakshmi Engineering, and later at Srikalahasti for a certain MIs. Banwarilal Agarwala group. None of these works fetched him taxable income. Upon questioning, he stated that originally he did not file any returns but found it necessary to do so upon being prompted by the assessee Company. In his answer to Question No.21 of the statement recorded u/s.131 on 13/01/2012, he stated that,

> *Originally, I have never filed IT returns in the name of MIs. Sushi Udyog Constructions Company and also in my individual name. Few months, MIs. Saisudhir people have asked me about my IT returns. I realized that my returns are not filed. Immediately, I consulted Mr. Gopal of Nandyal, Income-tax Practitioner and filed returns of MIs. Sushi Udyog Constructions Company for A.Y. 2008-09 to 2010-11 and my individual returns for two years A.Y. 2009-10 and 2010-11...*

7.5 CIT(A) noted that it is further claimed that books of account were not maintained by Sushi Udyog Constructions Company as well as J.K.Enterprises. When asked about how control was exercised over works done and the receipts and payments of the business he stated in his answer to Question No.15 (on 11/02/2012) that “I used to make payments as and when required never kept record of any thing.” He, however, could recollect details of works executed in January, 2007 and August, 2008 at various locations in Andhra Pradesh, Karnataka and Orissa, for the assessee company in the name of Sushi Udyog Construction Company as well as J.K. Enterprises. Though he never worked in the state of Orissa he

could recollect purchasing stone and stone dust for the assessee company from two local suppliers at Paradip, Orissa, by name Mr. Pathikanta and Mr. Jitendra Sahoo - whom he met on a visit to Paradip. He claimed that it was not necessary to keep their address because "They used to deliver stone and stone dust at the site paid them in cash at the site." (Answer to Question No.30 on 11/02/2012). When asked about documents pertaining to the supplies made he stated that he did not possess any records and that he would get it from "Sai Sudhir" and furnish the copies. He claimed to have made all payments (approximately Rs.15 crores) in cash at Paradip. He claimed that the cash was withdrawn from the bank account of Sushi Udyog Construction Company and J.K.Enterprises with Corporation Bank, Jubilee Hills Branch, and HDFC Bank, Pet Basheerabad Branch at Hyderabad, and transported in person by him. When asked about the unreasonable risk taken in the process when banking facilities are available at Paradip or Cuttack or Bhubaneshwar, he replied in his answer to Question No.44 (11/02/2012) as under:

> *"Initially; I thought it was small work and therefore did not open the bank account. I have come to know the size of the operations only later."*

He was asked about the total quantity of stone and stone dust thus procured and supplied on behalf of the assessee company. He stated that he would verify and submits the details later. However, it is Sri Janardhan Reddy's answer to the next question that offers a pertinent insight into the profile of this person.

> *"Q.No.48 You already submitted that you did not maintain any record or books of account for MIs. Sushi Udyog Constructions Co and MIs. JK Enterprises. In the absence of the same, how will you verify quantity details.*
>
> *Ans: I will obtain the details from Saisudhir and submit the same."*

7.6 CIT(A) observed that Sri Janardhan Reddy was confronted with details of withdrawals from bank accounts ostensibly for various payments, including those made in connection with supply of stone and stone dust. Withdrawals aggregating to Rs.21.01 crores from Corporation Bank, Jubilee Hills Branch on various dates from July, 2010 to April, 2011, and

withdrawal of Rs.12.90 crores on various dates from December, 2008 to June 2010 from Karnataka Bank, Raj Bhavan Branch, and withdrawal of Rs.7.76 crores on various dates from December, 2010 to June, 2011 from Corporation Bank, Film Nagar Branch showed that RTGS credits from the assessee company were followed by cash withdrawals. These cash withdrawals are by bearer cheques containing the signatures of Sri M.S.Reddy, or Sri Ajay Kumar or Sri T. Shankar affixed on the reverse side of the instrument. Sri Janardhan Reddy stated that all of them were employees of the assessee company including Sri M.Chandra Sekhar Reddy - who signed as 'M.S.Reddy'. It was stated that MIs. Sai Sudhir Infrastructures Ltd. (the assessee company) had faced liquidity problems, because of which he handed over signed blank cheques to Sri N.Chandra Sekhar Reddy who would withdraw cash whenever possible, and keep it with him so that it could collected and carried to Paradip. Sri Janardhan Reddy was also confronted with the fact that supplies at Paradip were allegedly made in February & March, 2010 whereas payments for these supplies were withdrawn much later, and as late as December, 2010. It was simply stated that the suppliers were willing to extend credit to Sri Janardhan Reddy considering the profile of assessee company.

7.7 CIT(A) observed that the 'sub-contractor' is a person who was not found at his address, and apparently never operated out of that address, had no expertise or resources or track record that could - to a reasonable mind, sustain multi-crore operations, and yet the assessee Company saw execution capabilities not otherwise apparent. This person admittedly did not execute work for anybody else. The 'sub-contractor' had no records, no documents beyond what "Sai Sudhir" could furnish, entered into multi-crore supply contracts admittedly without any idea of the "size of the operations'; entered into supply agreements with unknown persons whose address was not considered necessary to keep, because supplies were settled by cash payments in any case. To settle such payment obligations, the subcontractor is seen to have travelled 20 - 25 times from Hyderabad to Paradip, by train and by road with huge amounts of cash, exposing himself and the cash to what would otherwise have been unacceptable levels of risk. The use of banking channels - that was unarguably available in abundance, was never considered a worthwhile option. The alleged

suppliers of stone and stone dust worth crores of Rupees, who were essentially unidentified persons known as nothing more than one Mr. Pathikanta and another Mr. Jitendra Sahoo, were persons who were comfortable in extending credit running into crores of Rupees without any counter guarantees whatsoever. In the face of these circumstances, the Managing Director of the assessee-Company would assert that the works were executed by the 'subcontractor' for the reason that RA Bills were furnished. In the facts and circumstances of the case however, these payments cannot be seen as payments that are within the range of normal human probabilities in any genuine business transaction.

7.8 CIT(A) observed that a similar position obtains in the case of another important 'sub-contractor', Sri A. Chandrakanth Reddy, Prop. Spectrum Infrastructure. He also has no Office, hails from a very modest background possessing no immovable property, and little or no movable assets. He is seen to have earned his livelihood as a "Head Over Man" at Singareni Collieries, at their Godavarikhani mines on a monthly salary of Rs 11,000/- till 1996, and as a real estate commission agent at Siddipet till 2008, when he claims to have started 'sub-contract' work and labour supply work for Sai Sudhir Infrastructures Ltd (the assessee Company). Like Sri Janardan Reddy, supra, Sri Chandrakanth Reddy was a dedicated 'sub-contractor' executing works exclusively for the assessee Company, and nobody else. Like Sri Janardan Reddy, he did not find it necessary to file a return of income till he was prompted to do so by "Sai Sudhir Infrastructure people" and did not maintain any books of account. He was, however, able to recollect details of work executed for the assessed Company, including identical instances of 'purchase' and supply of stone and stone dust for works at Paradip. The circumstances of the transactions - including supply of material at Paradip, were identical. He claimed to have met one Mr. Sahoo and Mr. Mohanti at Paradip who agreed to provide the required quantities of stone and stone-dust. Shri Chandrakanth Reddy states that he does not know their full name, address or even phone number. There was no written agreement or any other record of transactions. The said Mr. Mohanti and Mr. Sahoo were content to arrange supplies because they received payment in cash. The total payments made of this account for supplies made in February and March, 2010 is about Rs. 27 crores. The

bank accounts operated by Sri Chandrakanth Reddy showed withdrawals of only Rs.2.99 crores during this period. There is, therefore, no correlation between the amount claimed to have been spent and amount withdrawn from bank accounts in this period. As in the case of Sri Janardhan Reddy the alleged suppliers at Paradip were agreeable to extending credit to an unknown person like Sri Chandrakanth Reddy, without any counter guarantee. As in the case of Sri Janardhan Reddy bank statements show that RTGS credits were received into the Corporation Bank, Jubilee Hills Branch account of Spectrum Infrastructure which was withdrawn in cash by bearer cheques on which signatures of Sri M.S.Reddy / Sri Ajay Kumar / Sri T. Shankar were affixed. Sri Chandrakanth Reddy also identified the signatures as belonging to employees of Sai Sudhir Infrastructures Ltd. including Sri M. Chandra Sekhar Reddy who had the habit of signing as M.S. Reddy. It was claimed that total cash withdrawals made in this fashion from March, 2010 to June, 2011 aggregating to Rs.44.18 crores was expended towards cash carried in Paradip in person (Rs. 27 crores) and approximately Rs. 17 crores on account of labour payments and works executed for Sai Sudhir Infrastructures Ltd. in Karnataka. It would be immediately apparent that the nature and circumstances of the expenditure incurred through the agency of Sri Chandrakanth Reddy including the various improbabilities, are identical to those in the case of Sri S. Ianardhan Reddy noted herein above at para No. 7.2.4.

7.9 The CIT(A) observed that it is seen from the records of the Assessing Officer that in addition to the payments 'incurred' through the agency of Sri Janardhan Reddy (Sushi Udyog / J.K. Enterprises) and Sri Chandrakanth Reddy (Spectrum Infrastructure) payments 'incurred' through six other persons were also identical in nature. The RTGS Credits into the accounts of these six persons received from the assessee company are seen to have been withdrawn by bearer instruments endorsed to the same employees of assessee company viz., M.S.Reddy / Ajay / T. Shankar. In many instances the signature is accompanied by the mobile number of these employees. These six persons are

a. *Gee Constructions (HDFC Bank Naeharam Branch, a/c No. 3682000006177)*

b. Surya Erectors (HDFC Bank Naeharam Branch, a/c No. 3682000006184)

c. Prasad Reddy & Co. (Karnataka Bank Raj Bhavan Road, a/c No.33420001 00035901)

d. B Narsimha Reddy (Karnataka Bank Raj Bhavan Road, a/c No.3342000100035001)

e. M Krishna Reddy (Karnataka Bank Raj Bhavan Road, ale No.3342000100036301)

f. T. Srinivas (Corporation Bank Film Nagar, a/c No. 27530200000163 & a/c No. CBCA 101100019).

7.10 The CIT(A) observed that the above 8 persons referred to at para 7.2.4, 7.3 and 7.4 above had 9 business entities which operated between them 12 bank accounts. These details are tabulated as under:

S.No.	Name of the 'subcontractor'	Bank/Branch /Account Number	Cash
1	MIs GEE Construction company	HDFC Bank, Nacharam	78189000
2	MIs Surya Erectors	HDFC Bank, Nacharam	96590000
3	MIs Spectrum Infrastructure	Corporation Bank, Filmnagar	428307350
4	MIs Sushi Udyog Construction Company	Corporation Bank, Filmnagar – CBCA/01/000149	210132650
5	-do-	Karnataka Bank, Rajbhavan Road, 3342000100032701	136165000
6	MIs JK Enterprises	Corporation Bank, Filmnagar – CBCA/01/000148	77645000
7	-do-	HDFC Bank, Pet Basheerbagh	646100000
8	MIs Prasad Reddy & Company	Karnataka Bank, Rajbhavan Road,	70122561
9	Mr. B. Narsimha Reddy	-do-	52456920
10	Mr. M. Krishna Reddy	Karnataka Bank, Rajbhavan Road, 3342000100035901	54509810
11	Mr. T. Srinivas	Corporation Bank, Filmnagar	105018000
12	-do-	Bank of Baroda, Madhapur 27530200000163	10045000
		Total	1383791291

CIT(A) noted that the internal breakup of these transactions contains an analysis of the debit instruments pertaining to the above 12 bank accounts. The tabulation of these debit instruments shows that as per evidence recovered during Search and post-Search operations 430 bearer instruments drawn on the above 12 accounts were encashed thereby withdrawing a total amount of Rs.138,37,91,291/- in the financial years 2008-09 to 2011-12. Almost each and everyone of these bearer instruments are seen to be endorsed to one or other of the above three names identified as employees of Sai Sudhir Infrastructures Ltd. (the assessee company). The inescapable conclusion that emerges, therefore, is that almost the entire expenditure booked in the name of the above entities have been collected in the form of cash by the employees of the assessee company.

7.11 The CIT(A) observed that the statements of the employees, including the CFO of the company Sri A.V.K.S.Prasad referred to in the assessment order would show that this was with the consent of the management including the M.D., Sri D. Sreedhar Reddy. In fact, the statement recorded from Sri A.V.K.S.Prasad, CFO of the assessee company during the Search operations on 30/11/2011 shows that he was confronted with the statements recorded from T. Shiva Shankar, Driver of the Managing Director and Sri N.Chandra Sekhar Reddy who stated that cash was withdrawn from the accounts of Spectrum Infra and Sushi Udyog on his directions. In his answer to Question NO.6 he replied as under:

> *"It is to state and confirm that upon my instructions and upon instructions of my MD. Sri D. Sreedhar Reddy- I have handed over the above mentioned self-cheques of M/s.Spectrum Infra and M/s. Sushi Udyog Construction Company to Sri T. Shiva Shankar, the driver of Sri Sreedhar Reddy and Sri M.Chandra Sekhar Reddy, Co-ordinator of M/s. Sai Sudhir Infrastructure Ltd to withdraw the cash by signing cheques on the back side. These monies so withdrawn had been used for the business purposes of M/s Sai Sudhir Infrastructure which is unexplained in nature."*

7.12. The CIT(A) noted that during the Search proceedings a statement was recorded from Sri D.Sreedhar Reddy, Managing Director of the assessee company u/s.132(4) on 01/12/2011. It is seen that after taking him through various details of transactions with Spectrum Infrastructure

and Sushi Udyog at Q.No.30 he was confronted with the details of cash withdrawn by his employees from the accounts of the alleged sub-contractor. The Question and Answer are extracted hereunder for ready reference.

> *"30: As a part of investigation the debit instruments of the above two accounts have been obtained from the bank It is seen from the debit instruments that cash was withdrawn from the above accounts by Mr. M S. Reddy; Mr. Ajay and Mr. T Shankar. Today- during the course of search and seizure operation u/s 132, it is known that Mr. M S. Reddy's full name is Mr. M Chandrashekhar Reddy and he is working as an Asst Manager (Co-ordination) in MIs SSIL. Similarly, Mr. T. Shankar is a. Driver of MIs SSIL. Mr. K Ajay is Asst Manager (Finance) of MIs SSIL. I am showing you statements of Mr. T Shankar and Mr. M S. Reddy recorded u/s 132(4) today wherein they have stated that the cash was withdrawn from the above accounts as per the instructions of yourself and Mr. A VKS Prasad, CFO of MIsSSIL. The facts stated by these two persons have been confirmed by Mr. A VKs Prasad in his statement recorded u/s 132(4) today Please go through these statements and explain as to why the employees of SSIL have withdrawn cash from the bank accounts of the above so called sub-contractors and what do you have to say in this matter?*
>
> *Ans: I have gone through the statements of Mr. T. Shankar, Mr. M S. Reddy and Mr. A VKs Prasad recorded u/s 132(4) during the course of search proceeding, which have been shown to me. I have already stated that MIs Spectrum Infra and MIs Sushi Udyog are sub contractors of MIs SSIL. It is a Fact that my employees have withdrawn certain amounts from the bank accounts of these two subcontractors. The amounts so withdrawn have been used for the purpose of business of SSIL. However, I am unable to substantiate the expenditure right now. Therefore, to avoid any litigation and to buy peace with the department and to take care of all the discrepancies which might be found in this premises or in the premises covered under search/ survey conducted by the department in my group companies, I voluntarily admit an additional undisclosed income of Rs. 75,00,00,000/- (Rs. Seventy five Crores) for the assessment years relevant to financial years 2008-09, 2009-10, 2010-11 and 2011-12 in the hands of MIs SSIL, MIs Sai Sudhir Energy Limited, myself and my wife Smt. D Aparna Reddy. I shall furnish the year-wise and party-wise breakup in due course."*

7.13 During post Search investigations, the Managing Director Sri D. Sreedhar Reddy was reminded for compliance in the matter of producing Sri A. Chandrakanth Reddy, Sri S. Janardhan Reddy, of the alleged sub-contractor firms as well as the other persons for examination. In a statement recorded u/s.132(4) on 29/12/2011, while agreeing in this regard

to arrange compliance soon, the Managing Director also reiterated his admission of unexplained expenditure in his answer to Question Number 14 as under:

> *"On the day of Search i.e. on 30-11-2011, I have admitted an additional and undisclosed income of Rs. 75 Crore for assessment years relevant to financial years 2008-09, 2009.10, 2010-11 & 2011-12 in the hands of MIs. Saisudhir Infrastructures Limited, M/s. Saisudhir Energy Limited, myself and my wife Smt. D. Aparna Reddy ... "*

7.14 Sri D. Sreedhar Reddy reiterated his admission of unexplained expenditure on account of sub-contract expenses recorded in the books of Sai Sudhir Infrastructures Limited in the course of a statement recorded u/s. 132(4) on 28/01/2012 vide his answer to Question No.3, relevant part of which is as under:

> *"As far as the company is concerned, this is to submit that the explanation of Mr. K Ramchander Rao, Technical Director, with reference to certain entries in the papers found during the search operation at Bangalore, vide his statement dt. 30.11.2011, that such entries represented business promotion expenses paid to various persons for facilitating award of contracts and also release of payments, is tactually incorrect. After a detailed discussion with the said director, it appears to us that the entries in question were only rough estimates prepared by the site in-charges. In this regard, I would like to state that no such payments were made by us to anybody for the said purpose. In fact, the company had never authorized nor encouraged such payments. This fact is also evident from the accounts of the company, as no such expenditure was debited to P&L account. It is further submitted that all the sub-contracts were genuine and accordingly the works given on sub-contract were duly executed by such sub-contractors. However; some of them were small contractors who used to rely on our staff for their day-to-day administrative works, including bank works. Thus, though some of our staff members had facilitated in smooth execution of their works, the company had no role to play.*
>
> *However, to buy peace with the department and to avoid protracted Litigation and thereby to settle all the matters amicably and to cover up all the deficiencies In the books of account and other documentation I admit additional undisclosed Income of Rs.5517 lakhs in the hands of M/s Saisudbir Infrastructures Ltd for FY 2007-08 to 2011-12. This disclosure is made with a prayer that no further additions are made under any other head in the hands of the company oi' under any head in the hands of the sub-contractors as most of the disclosure is on account of deficiencies in respect of*

such sub-contract expenses. With the above, I summarize the additional income admitted as below:

(Rs. In lakhs)

In the hands of	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
Mr. D. Sreedhar Reddy	-	-	822	-	-
Smt. D. Aparna Reddy	-	-	-	-	1161
MIs Saisudhir Infrastructures Ltd.	657	833	2201	1508	318

7.15 Subsequently, on 19/04/2012, Sri D. Sreedhar Reddy was again examined on the aspect of expenditure booked in the name of the concerns operated by Sri Janardana Reddy and Sri Chandrakant Reddy. He was taken through the statements recorded from both of them and asked to explain why an adverse view cannot be taken considering the various improbabilities in their stated business activities allegedly on behalf of the assessee company. It was explained by Sri Sudheer Reddy that in so far as the supply of stone at Paradip is concerned, it was a back to back contract from M/s IVRCL, and since payments were made to Sri]anardana Reddy and Sri Chandrakant Reddy after supplies were received at the site, there was no occasion for any further exercise of diligence, beyond offering its share of profit in the venture. That this does not explain why payments made to Sushi Udyog, J.K Enterprises and Spectrum Infrastructures had to be encashed by its own employees is lost upon Sri Sudheer Reddy. However, in the statement recorded on 19/04/2012 the Managing Director once again re-affirmed that additional income of Rs 55.17 crores has been offered to cover for all such deficiencies as may be possible in these circumstances.

7.16 It follows therefore, that an admission of undisclosed income to cover for expenditure liable to be seen as not satisfactorily explained has been made initially on 1/12/2011, and thereafter affirmed on 29/12/2011, 28/01/2012, and again on 19/04/2012.

7.17 The CIT(A) observed that in appellate proceedings, however, it was stated by the Ld. A.R. that the statements recorded were made available only on 15/01/2015, and hence the submissions before the Assessing Officer were incomplete, and opportunity extended was not adequate. In the affidavit notarised on 01/06/2015 and introduced as additional evidence, the Managing Director contradicted his admission during Search and post-Search proceedings by stating that the Search proceedings initiated on 30/11/2011 continued till 8.00 a.m. the next day and, therefore, the deposition was made "under confusion", It was also stated that facts were not fully recorded in the statement and that the statement was signed under pressure and duress. On the merits of the expenditure claimed it is stated as under:

> *"I state that the sub contract payments are genuine. The amounts paid by the company were paid to the contractors through cheques. Tax deducted at source at regular Intervals. The sub contractors maintained separate bank account The amounts were drawn by the sub contractors. The company- the Chief Finance Officer and other staff members facilitated the sub contractors in withdrawing cash from the bank The amounts so withdrawn were utilized by the sub contractors at the work site.*
>
> *I state that the works were entrusted by the Principal Contractor to our company and our company got the works done through the Sub Contractors and the Principal Contractors made payment on satisfying themselves about the completion of the work I state that the payments made to the Sub Contractors are all genuine. I also state that the declaration made by me 'Was wrongly made because of duress and is not voluntary. I state that the declaration is opposed to the facts on record"*

7.18 The CIT(A) observed that while the merits of the claim for expenditure will be addressed separately, the claim now made that the admission of unexplained income was made in a state of search-induced confusion, does not stand to reason. As noticed above, the deposition made on 01/12/2011 has been reaffirmed - not once or twice but three times, on 29/12/2011,28/01/2012, and again on 19/04/2012. As would be evident, Sri Sreedhar Reddy did not have occasion to recognize any confusion or duress on any of the above dates, which were not only long after the Search proceedings commenced but were also spread over a period of five months. The statements recorded - on three out of the four occasions, have been recorded in the presence of witnesses, whose

independence Sri Sreedhar Reddy had no occasion to question. This is, therefore, not a deposition recorded in the heat of an on-going Search, but a deposition that has been the subject of deliberation, in the face of facts and document placed before him in an investigation that spread over a period of time. In the circumstances, the omission to abide even by-the admitted figure, not to speak of making a true and complete disclosure, is a retraction that cannot hold water. It is also not the case of the assessee that statements were requisitioned but were refused. In any case, considering that the notice u/s 153A was issued within a few months of the last of the depositions affirming the admission of income, it hardly stands to reason that the assessee was unaware of the issue(s) under examination in consequence of the Search. That the statements were furnished later, will, therefore, not make any difference to the fact that the retraction made in the Return (filed in response to the notice u/s 153A dated 05/12/2012) is not maintainable.

7.19 In view of the above observations, the CIT(A) rejected the cases relied upon by the assessee, and held as under:

> *"9.3 On a conspectus of the above facts and consideration of various submissions made, it is seen that the assessee claims the expenditure booked in the name of the various subcontractors described herein-above, is admissible business expenditure. The Assessing Officer on the other hand, relied on the information collected during the Search and post Search verifications, that bank accounts belonging to certain 'sub-contractors' were operated by employees of the assessee company, to withdraw cash by presenting the 'self' cheques signed by these persons, to hold that the expenditure was not genuinely incurred. The assessee contested this conclusion, urging that the transactions are 'properly' documented with regard to agreements, work orders, cheque payments and taxes deducted at source on such payments. It is further stated in its defence that such sub-contractors are assessed to tax and that there is no evidence that work was not executed to the specifications recorded in the documentation. In appellate proceedings, it has been noticed that the assessee does not deny the facts noticed by the Assessing Officer but claims that its employees merely assisted the sub-contractor in withdrawing cash from the bank. The various improbabilities of the explanation offered by the assessee have been discussed in the preceding paragraphs, and in the context of the evident lack of credentials of such subcontractors to execute the works credited to them. The very fact that the assessee's employees had access to the cheque-book of the other entities casts a shadow on the assessee's claim. This cannot be erased by documents such as agreements / work orders / returns of income filed by sub-contractors / taxes deducted on payments made, which are in the*

circumstances of the case, liable to be seen as self-serving evidence created by interested parties. On the facts of the present case, to insist that the Assessing Officer should have accepted the genuineness of the claim would amount to insisting on form. to the exclusion of the substance of the transaction. On the facts of the present case, the Supreme Court decisions in the case of CIT v. Durga Prasad More [1971] 82 ITR 540, and Sumati Dayal v. CIT[1995] 214 ITR 801, among others, is more relevant. As noticed by the Apex Court when transactions fly in the face of human probabilities the apparent should not be mistaken for the real.

9.4 In a similar context, where documents claimed existence of a set of transactions, but circumstances contradicted the claim, the Mumbai Bench of the Hon'ble ITAT held as under in the case of ITO v. Shamim M Bharwani. ITA No. 4906/MI2011 dt. 27/03/2015.

> *"4.1 ... That genuineness could validly be tested on the ground or principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in Sumati Dayal (supra) relied upon by the Revenue, wherein the apex court, in declaring the transaction as non-genuine-discarded a host of documentary evidences filed or relied upon by the assessee-assessee That documentary evidences are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well settled, and for which the Revenue relies on the decision in the case of Durga Prasad More (supra). What is relevant, more so where the genuineness ofthe transaction is in issue, is the truth of the document/s furnished in substantiation, as well as the substance of the transaction and not its form, and which is to be determined on the basis of and on the conspectus of the entirety of the facts and circumstances of the case ...." [EMPHASIS SUPPLIED]*
>
> *4.5 ... We find the observations by the AO as valid and relevant; to no satisfactory answer or explanation by the assessee, i.e., to the questions, incidents or the phenomenon observed dismissing the same as mere suspicions, as does the ld. CIT(A), is, to our mind glossing over the many attendant facts and incidents, the most vital, and on which We observe complete silence or absence of any explanation is the absence of any credentials of the investee-company, The Id. CIT(A) picks up one incident or aspect of the transaction at a time to note of it being backed by documentary evidence/s and, therefore, genuine. The approach is fallacious. First documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts; each probable in itself; albeit low, so as to cast a serious doubt on the truth of the reported 'facts; which together make up for a bizarre*

statement, leading to the inference of compulsiveness or a device set up to conceal the truth i.e., in the absence of credible and independent evidences .... "

4.6 The assessee has relied on several case laws. As would be apparent from the forgoing abundant case law has been relied upon by the both sides. The issue is not of the application of any particular case law. The legal propositions being well settled, each case rests on its own facts. Our decision likewise, and as would also be apparent is guided solely by the facts and circumstances of the instant case, including the assessee's explanation in respect thereof The reliance on case law, the facts of none of which were gone through at the time of hearing, even as the issue is principally factual would thus be of no assistance to the assessee's case. We may though clarify that the Revenue having invoked the provision of s. 68, the burden to prove the credit transaction/s and, thus, its genuineness, is on the assessee. It is therefore not necessary or incumbent on the Revenue to, i.e., for the purpose of application of sec68, to either disprove or exhibit the transaction as sham or bogus, and its obligation only extends to show that the genuineness of the impugned credit transaction is doubtful or has not been satisfactorily proved by the assessee."

9.5 These observations are equally applicable in the context of section 37(1). To conclude, therefore, the assessee had claimed to have incurred expenditure in making payments to certain persons who are introduced as sub-contractors. If the transactions between two independent persons are at arms-length there would have been no occasion to collect in cash, the very payments that have been made to such persons by cheque. Whether the assessee is a IV partner, Principal Contractor or sub-contractor, and whether assessee in the circumstances could have been the beneficiary of cash generated, is not the primary issue. In the facts of the case noticed herein above the assessee is liable to explain the utilization of cash seen to have been mopped up by its employees. The onus in this case does not get discharged by merely claiming that the cash was in turn handed back to the payees, for utilization at respective work sites in the neighboring states. It is also noteworthy that such payees who needed the assistance of the assessee to encash cheques in Hyderabad, for expenses to be defrayed in Karnataka and Orissa were in the first place persons who had no demonstrable execution capabilities. It is held, therefore, that the assessee has not been able to make out a case that the impugned amounts have been "laid out or expended wholly and exclusively for the purpose of the business." The disallowance of business expenditure made in the assessments for AY 2007-08 to 2011-12 is therefore upheld."

8. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal:

"1. The order of the learned Commissioner of Income-Tax (Appeals) is erroneous to the extent it is prejudicial to the assessee.

2. The learned Commissioner of Income-Tax (Appeals) erred in confirming the addition of Rs.6,76,11,858/- made by the Assessing Officer representing the sub contract amounts paid to Prasada Reddy & Co, without considering the explanations submitted.

3. The learned Commissioner of Income-Tax (Appeals) erred in confirming the disallowance 'of Rs. 7,97,270/- representing the amount paid to Sri T. Srinivas towards sub contract. The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that this is the balance outstanding paid during the year.

4. The learned Commissioner of Income-Tax (Appeals) erred in considering the statements recorded at the time of search without considering the affidavit filed by the Managing Director of the assessee company retracting from the admission made at the time of search.

5. The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that the assessee entered into an agreement of sub contract with the sub contractors; paid the amounts through cheques deducted tax at source and got the work completed.

6. The learned Commissioner of Income-Tax (Appeals) failed to see that the sub contractors admitted the receipts in their returns of income and were assessed to tax.

7. The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that there was no evidence to show that the amounts were received back by the company from the sub contractors in any manner.

8. The learned Commissioner of Income-Tax (Appeals) ought to have held that the amount paid to the sub contractors is a legitimate expenditure incurred by the assessee in executing the works undertaken by it.

9. The learned Commissioner of Income-Tax (Appeals) ought to have seen that the principal contractor sanctioned the bill based on the works undertaken by the sub contractors.

10. The learned Commissioner of Income-Tax (Appeals) ought to have seen that the details of each of the sub contract work undertaken and found that the said contracts were genuine and ought to have directed the Assessing Officer to delete the addition.

11. The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that in case the sub contract payments were to be considered as not genuine, the profit rate would be abnormal which fact clearly indicates that the sub contract payments are genuine.

12. The learned Commissioner of Income-Tax (Appeals) erred in confirming levy of interest u/s 234A, u/s 234B and u/s 234C of the I.T. Act.

13. Any other ground that may be urged at the time of hearing."

9. Before us, ld. AR of the assessee filed written submIssions, which are as under:

"1. The appeals filed by the assessee are for the assessment years 2007-08 to 2011-12; whereas the appeals filed by the Department are for the assessment years 2009-10 to 2012-13.

2. In so far as the appeals filed by the assessee are concerned they are against the disallowance of the payments made to some of the sub contractors against the works entrusted by the assessee to its sub contractors. The details of the sub contractors and the works entrusted to them are separately furnished in a statement annexed. The said details were already filed in the paper books earlier filed by the assessee and are part of the submissions made before the CIT (A). The assessee is furnishing the details separately showing the works executed by the assessee; works entrusted to the Sub contractors and the works executed by each of the sub contractors.

3. The statements furnished by the assessee include the amounts received from the principal contractors and the amounts paid to the sub contractors. It can be seen from the details that some of the works entrusted to sub contractors are back to back contracts. In some other cases, major part of the work was entrusted to the sub contractors. In back to back contracts, a small margin was left to the assessee. The details are submitted in the annexure.

4. The assessee in this regard submitted as under:

- *a) The amounts were paid to the sub contractors through cheques and the cheques were directly deposited into the account of the sub contractors.*
- *b) The assessee entered into sub contract agreements mentioning the specifications of the work entrusted.*
- *c) The payments were effected after deduction of tax at source*
- *d) The details of the returns of income filed by the sub contractors are submitted separately in the list.*
- *e) The principal contractors who allotted the work are satisfied with the execution of the work and paid the bills*
- *f) There is no indication in the seized documents that any part of the entrusted to the sub-contractors work was executed by the assessee. On the other hand, the bills*

and payments made to the sub contractors were found during the search and seizure operations.

g) *No such disallowance was made for the assessment year 2012-13, though sub contract payments were made to the same sub contractors.*

h) *If the sub contract payments were to be disallowed, the income determined would be sometimes more than 90% or otherwise an unusual profit is arrived at. The details of such profits are submitted in the annexure.*

5. The Assessing Officer, on the other hand, is of the view that the sub contract payments are not genuine for the following reasons:

a) *The Assessing Officer referred to the statements recorded at the time of search and seizure operations from Sri M.Chandrasekhara Reddy, Sri T.Siva Shankar, Sri K.Ajay Kumar and Sri AVKS Prasad and Sri D.Sridhar Reddy.*

b) *According to the Assessing Officer, the sub contractors received the cheques from the assessee and deposited the same with the bank.*
At the time of withdrawal, the said sub contractors issued the cheques but on the back side, the assessee's employees and the sub contractors signed.

c) *The Assessing Officer mentioned that the cheques drawn by the sub contractors were shown to the employees and the employees confirmed that they signed on the backside of the cheques.*

d) *The Assessing Officer also referred to the statements of Sri D.Sridhar Reddy, M.D. and the employees of the company. According to the Assessing Officer, the MD accepted for admission of additional income of Rs.75 crores.*

e) *The Assessing Officer mentioned that the cash withdrawal from out of RTGS credits amounted to Rs.65 crores.*

f) *The Assessing Officer is of the view that the sub contracts have come into existence to provide bogus bills to siphon off the money. Accordingly the assessing officer made the following additions:*

2007-08	-	*Rs. 6,84,09,128*
2008-09	-	*Rs.20,94,13,127*

2009-10	*-*	*Rs.35,63,94,957*
2010-11	*-*	*Rs.82,74,57,402*
2011-12	*-*	*Rs.15,74,25,608*

	Total:	*Rs.161,91,00,222*
		----------

g) Aggrieved with the order of assessment, the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-11, Hyderabad on 10.04.2014. In the said appeal, the assessee contested the addition made by disallowing the payments made to the sub contractors and the disallowance of deduction u/s80IA of the Act.

6. With regard to the disallowance of expenditure, the assessee, during the hearing, before the learned CIT (A), submitted detailed written subMIssions and also filed details. It is mentioned that:

a) The statement recorded from the M.D or the staff should not be considered as they, during the assessment proceedings filed affidavits explaining as to why the statements are not to be considered.

b) The amount paid to sub-contractors was never received by the assesee and no evidence was found during search to this effect.

7. The statements recorded at the time of search were provided to the assessee on 02.01.2015, in response to the letter dated 29.12.2014 filed by the assessee. After going through the copies of the statements provided by the department, all the persons i.e. Sri D.Sridhar Reddy, Sri AVKS Prasad, Sri Chandrasekahra Reddy and Sri K.Ajay Kumar filed the affidavits.(Page No's 23-32, 35-43, 46-47 and 50-51 of the common paper book).

8. The assessee also filed the returns of income filed by the sub contractors and affidavits from the sub contractors. All the subMIssions made in this regard are in the paper books submitted.

9. As the assessee filed affidavit retracting from the statements earlier made and as the assessee submitted returns of income filed by the sub contractors; agreements entered into with the Principal Contractors and the sub contractors, the learned CIT (A), referred the matter to the Assessing Officer for remand report. He forwarded copies of the affidavits and the written subMIssions filed before the learned CIT (A). The remand report is at pages Nos75 to 85 of the consolidated paper book.

10. In the remand report, the Assessing Officer mentioned that –

a) *Proper opportunity was given by the Assessing Officer at the time of completion of the assessment proceedings.*
b) *That the enquiry was not limited to 3 sub contractors but was extended to 7 sub contractors. The aggregate of which works out to Rs.62,54,61,833/-.*
c) *The Assessing Officer at para 5.4 accepted the contention of the assessee that the work was entrusted to the assessee as per the agreement and that the work was completed through the work orders or the agreements with the sub contractors and also agreed that the assessee produced the bills raised by the sub contractors.*

d) *With regard to affidavits filed by the sub-contractors, the Assessing Officer accepted that there are affidavit from Sri Prasad Reddy , Sri Krishna Reddy, Sri Narasimha Reddy, Sri P.Srinivas, Sushee Udyog Constructions, J.K.Enterprises, Spectrum Infra etc. He referred to the cases where the affidavits were not filed i.e. Gee Constructions, Proprietor Sri KVV Satyanarayana, Surya Erectors, Proprietor Sri K.V.V.Satyanarayana. However, the Assessing Officer did not bring on record anything contrary to the facts narrated by the sub contractors in the affidavits.*
e) *With regard to assessments made in the case of sub-contractors, the Assessing Officer mentioned that in the case of Sri Prasad Reddy the assessments were completed u/s 143(3) and in other cases such assessments were not u/s 143(3) but were made u/s 143(1).*

f) *With regard to TDS particulars, the Assessing Officer found that the assessee deducted tax at source contemporaneously and not after the search and seizure operations.*

g) *The Assessing Officer once again referred to the statement of Sri D.Sreedhar Reddy, M.D. who agreed to admit additional income. However, the Assessing Officer did not comment on the affidavits of the Managing Director and the other employees.*

11. The remand report was sent through the Addl. Commissioner of Income Tax (Central). The Addl. Commissioner of Income Tax mentioned that:

a) *The Assessing Officer mentioned in his report that some of the copies of the returns filed by these entities were not produced before him and that it appears that the returns by the sub contractors were filed in the normal course and not after search action has been conducted.*

b) *There is no specific reference to any other issues like diary, documents depicting the backward flow of money.*

c) *Atleast the Assessing Officer's remand report does not mention of any such evidence for the backward flow of money.*

12. The observations of the Assessing Officer and that of the learned Addl. CIT would clearly indicate that there is no information in the material seized that the payment to the sub contractors are not genuine. The Assessing Officer and the Additional Commissioner of Income Tax refer to the statements recorded without referring to the affidavits filed.

13. The learned CIT (A) relied on the statements recorded from Sri D.Sridhar Reddy, MD wherein additional income of Rs.75 crores was offered by the Managing Director (Company – Rs.55.17 crores; Smt. Aparna –Rs.11.61 crores and Sri D. Sreedhar Reddy – Rs.8.22 crores) and the statement of the employees. The learned Commissioner of Income Tax (Appeals) brushed aside the statement recorded from Sri S.Janardhan Reddy who was produced. The learned CIT (A) discounted the statement of Sri Janardhana Reddy without any basis. Similarly, the learned CIT (A) did not accept the statements of Sri Chandrakanth Reddy, Proprietor, Spectrum Infra. He did not consider the affidavits of the employees of the assessee company and the affidavits of the sub contractors filed before him. On the other hand, the learned CIT (A) mentioned that the retraction made by the M.D. is not acceptable. He referred to various decisions which are distinguishable. He held that the retraction is not acceptable at this point of time.

14. The learned Commissioner of Income Tax (Appeals) passed an order on 30.03.2017 wherein he discussed the ground raised by the assessee against disallowance of expenditure incurred on payments to the sub contractors. The learned Commissioner of Income Tax (Appeals) held –

a) *that the retraction made by the Managing Director after a long period is not justified.*
b) *the examination of the sub contractors show that they do not have an office and they do not have the expertise or the track record;*
c) *at the time of withdrawal of the amounts by the sub contractors each and every cheque was endorsed by one or the other of the employees of the assessee and that, therefore, the money was received by the assessee.*
d) *During the course of search and seizure operations, statement was recorded from Sri D.Sridhar Reddy who*

accepted that he would admit an additional income of Rs.75 crores in the cases of the assessee, himself and his wife.

e) *He also held that the retraction made by the M.D is not justified.*
f) *The learned Commissioner of Income Tax (Appeals) is of the view that the percentage of the profit derived has no relevance as the transaction is collusive.*
g) *The assessment in the cases of the sub contractors were made on protective basis and not on substantive basis.*

15. In view of the above, the learned Commissioner of Income Tax (Appeals) did not accept the submissions made before him and dismissed the appeal. The assessee is before the Hon'ble Income Tax Appellate Tribunal seeking justice.

The learned Commissioner of Income-Tax (Appeals) is not justified in mentioning that the sub contractors are men of no means. Their capital is shown hereunder:

S.No.	Name of the sub contractor	Asst. Year	Capital in Rs.
01.	S. Janardhan Reddy	2009-10	24,69,500
02.	Prasada Reddy & Co	2007-08	21,00,000
03.	M. Krishna Reddy	2008-09	12,64,950
04.	B. Narsimha Reddy	2008-09	14,70,650
05.	A. Chandrakanth Reddy	2009-10	21,50,000
06.	Sushi Udyog Ltd.	2008-09	1,56,61,180

They possessed substantial capitals and the observations made by the learned CIT (Appeals) are not correct.

16. The assessee submits that the learned Commissioner of Income Tax (Appeals) ignored various facts brought to his notice by the assessee and also ignored the remand report submitted by the Assessing Officer duly forwarded by the Addl. Commissioner of Income Tax.

17. The assessee, in the following paragraphs, submits as under:-

a) *The sub contractors have deposed by way of affidavits and mentioned that they have rendered the work and carried out the sub contract works. Even during the examination of the two sub-contractors, they confirmed the fact that they rendered the service as sub-contractors to the assessee. They categorically asserted the facts before the authority. The Addl. CIT in his remand report submitted that the sub*

contractors filed returns of income in normal course or prior to search and not after search.

b) *Two of the sub contractors were examined post search. Sri Chandrakanth Reddy, Sri Janardhana Reddy have categorically accepted the fact that they have undertaken the sub contract works. They explained in detail as to how the work was rendered. They also explained as to how the amounts were utilised by them. The fact remains that none of the sub contractors denied having rendered the work. Or supplied the material or having received the amounts.*
c) *All the amounts were paid by the assessee through crossed cheques and were deposited in the accounts of the sub contractors.*
d) *The principal contractors accepted that the works were done and paid the bills raised against them. This fact clearly shows that the works were rendered by the assessee against which payments were received by the assessee. The fact that a third party accepted the work and paid the amount clearly indicates that there is no collusion. The allegation that there was "collusion" is not proved by the authorities and the CIT (Appeals) is not justified in using the word "collusion".*
e) *The learned CIT (A) obviously ignored the fact that agreements with sub contractors are not collusive as the work of a third party is involved. And the receipt from the principal contractor is accepted as true and correct.*

` *These facts are agreed to by the Assessing Officer and the learned Additional CIT in their remand report.*

18. In so far as the admission by the Managing Director and the statements of employees are concerned it is submitted that all the employees including the M.D. (except Sri Shankar) filed the affidavits before the CIT (A). The M.D. retracted from the admission of additional income made earlier. The employees have also stated that the earlier statement recorded was not based on any material except the cheques issued by the sub contractors. The employees explained that they signed the cheques only to facilitate the sub contractors to draw the amount.

19. The cheques issued by the sub contractors were encashed by the sub contractors themselves. They deposited the cheque issued by the assesee in their favour in their respective bank accounts. While withdrawing the amounts, the sub contractors required the help of the officials of the company who facilitated such withdrawals by affixing their signatures. The sub-contractors signed the cheques issued even on the back side of the cheques.

20. The persons who have allotted the work to the assessee i.e. the Principal Contractors are either the reputed concerns or the government agencies and the Assessing Officer did not bring on record any information that the principal contractors did not get the work done through the assessee. Therefore, the Assessing Officer cannot tax 60% to 95% of the receipt as income.

21. The Addl. CIT in his remand report categorically mentioned that there was no evidence in the seized material to show that the amount was paid back to the assessee. In the circumstances, the assessee submits that the CIT (A) is not justified in confirming the addition.

22. During the FY 2011-12 relevant for the AY 2012-13, the following amounts were paid to the following sub-contractors:

	Rs.in lakhs
Sri T. Srinivas	467.24
Sri B. Narsimha Reddy	6.54
Sushi Udyog Constructions	37.28
Sri M. Krishna Reddy	6.19
Spectrum Infra	283.81
Total:	801.06

The A.O completed the assessment u/s 143(3). This year is the year of search (the search was on 30.11.2011). it would indicate that the Assessing officer is satisfied with the existence and genuineness of the sub-contractors and the payments made to them.

23. The A.O did not apply his mind to the details about the agreements entered into; the payments made to the sub-contractors and the amounts debited to the P&L account. A statement to this effect is submitted as an annexure.

24. The decisions relied upon by the CIT (A) are not relevant to the facts of the cases. They are listed hereunder:

(1) 172 ITR 250 - Chuharmal Vs. CIT - Supreme court of India. The said case has no application to the facts of the assesse's case. In the said case the Hon'ble Supreme Court found that the searching party found foreign made wrist watches, the source for which was not explained. The value was offered by the assessee. In such circumstances the admission made can't be retracted.

It is submitted that in the case of assessee no evidence was found at the preMIses of the assessee to prove that the money has come back to him. The authorities did't find any assets or cash. The Learned Addl.CIT in his remand report observed that there is no such evidence except the statement recorded.

(2) 83 ITD page 102 – Video Master Vs JCIT - In the said case the disclosure was Rs. 3 crores. The Hon'ble ITAT found that the disclosure was fully supported by various documents seized during search. The seized documents, pass books revealed several crores of rupees. The addition of Rs.1,83,50,000/- was found to be insignificant number compared to the figures found in the documents.

The admission of Rs.75 crores in the case of assesee is not based on any as mentioned by the Addl.CIT in his remand report.

(3) 75 ITD 75 Ramesh T Salve Vs ACIT
In the said case the assesse accepted in a statement that on money was paid at the time of purchase of the flat. In addition to the statement, the Department was in possession of a confession by the sellers that 40% of the consideration was paid as on money. As both the purchaser and the seller declared that additional amount was involved, the addition made was sustained.

(4) 6 SOT 18 (Mumbai) Man Mohan Singh Vig Vs Dy. CIT
In the said case, the Hon'ble ITAT found that whatever the assessee stated u/s 132(4)and admitted as concealed income was based on documentary evidence and was confronted to him. In the case of the assessee no such evidence was found.

(5) 337 ITR 238 – ACIT Vs Hukumchand Jain - In the said case, during the course of search and seizure operations, the authorities found cash, gold ornaments and loan papers. The asessee could not explain cash and jewellery of Rs.30 lakhs. The said person surrendered the said amount which was held as undisclosed income.

(6) 108 ITD 142 Carpenters Classic Pvt. Ltd. - In the said case the authorities found unaccounted cash receipts of Rs.2,14,12,715/- and the assessee declared 50% i.e., Rs.1,07,06,088/- as his income.

(7) 263 ITR 169 Green View Restaurant Vs ACIT. In the said case, the High Court observed that addition was made on the basis of statement of a partner u/s 132(4) of the I.T. Act.

The Hon'ble High Court also found that the asessee was not provided with any opportunity to explain the retraction of the statement. Therefore, the matter was remitted to the file of the Assessing officer.

This decision supports the view of the assessee and does not support the view of the CIT (A).

25. The assessee submits that in all the above mentioned cases referred to by the CIT(A) there was information during the course of search and seizure operations and based on such data the statements were recorded. The Hon'ble Courts have found that additions are required to be made based on the material and that the admission made is only based on such information. Further, the courts also found that no evidence was brought on record to show that the retraction is true. In the last case referred to above, the Hon'ble High Court on 30.7.2003 held that when there was retraction and the assessee was not provided with opportunity to explain the case was remanded back to the Assessing Officer. In the case of the assessee, no material was found during search to prove that the money was received back by the assessee. The authorities did not find any undisclosed assets, undisclosed cash or any other material to prove the undisclosed income. The only basis is the cheques encashed by the sub contractors with the support of the employees of the assessee. This cannot be considered as the evidence for receipt of money by the assessee. The assessee further submits as under:

a) *Copies of the statements were provided on 02.01.2015 and not before the assessment was completed.*
b) *The Assessing Officer did not confine to the amount disclosed in the statements. The admission in the case of the company was Rs.55.17 crores and the AO. Made addition of Rs.161,90,90,222/-.*
c) *The statement of the Managing Director is not based on any material facts found during search.*

In view of the above, the assessee submits that the learned CIT (A) is not justified in not deleting the additions made.

26. The learned DR filed two paper books on 16.11.2018 and one of the paper book contained written submissions. The learned DR taken some arguments which were not earlier discussed either by the Assessing Officer or by the learned CIT (A). Therefore, the assessee is required to file further explanation and in the following paragraphs is submitting the detailed explanation.

27. The learned CIT DR referred to various seized material in the initial part of written submission. He mentioned that there was credible information or incriminating material to show that the sub-

contract payments are not genuine. This is not correct as neither the Assessing officer nor the CIT (A) have brought on record any such incriminating material.

28. The authorities below referred to the Cheques issued by the Sub-contractor and encashed from the bank. Even encashed cheques were brought from the bank by the department and not available with the assesee company.(Para 6.4 – question No.9 of the assessment order).

29. The learned CIT DR referred to various seized papers and mentions that they have a link with the payments made to sub-contractors. No such live links were established by the authorities. The assesee is separately submitting the details of the seized material referred to by the CIT DR. The details would clearly indicate that the assessee paid the amount through RTGS and were encashed by the sub-contractors. The sub-contractors, in turn, in some instances withdrew cash. Each of the cheque encashed would find the signature of the sub-contractor. The signature of the staff of the assessee is only to facilitate the sub-contractor in withdrawing the cash. This fact is evidenced by the affidavits of the persons. No evidence is brought on record to show that the assessee utilised the funds. The authorities did not find any material to show that the assesee was in possession of such amount.

30. In this regard, the assessee may be permitted to submit that there is no indication anywhere that the cash was utilised either by the company or by the Managing Director. The authorities did not find any evidence to show acquisition of any properties or not recorded in the books of account or any evidence showing outflow of cash outside books In the circumstances, the view of the learned DR is only a presumption and not based on any facts.

31. The Income tax authorities conducted search and seizure operations at the preMIses of the assessee and at various places connected with the assessee. They did not find any cash or Jewellery or any other assets which was not explained by the assessee. This clearly indicates that no cash was received by the assessee.

32. The learned CIT DR mentions that encashed cheques were impounded from the premises of the assessee. The encashed cheques are with the bank. They were brought from the bank by the authorities. These cheques are to be in possession of the bank and not with the assessee. They would not be supplied by the banker to any other outsider. The Assessing officer, while passing the assessment order extracted the statements of the

employees wherein a question is referred to the encashed cheques. There the DDIT mentions that the cheques were obtained from the bank. Therefore, the authorities first obtained copies of the cheques from the bank on 30.11 2011. and questioned the employees. Therefore, it is not correct to say that the encashed cheques were available with the assessee and were seized from the preMIses of the assessee.

33. The learned DR referred to the statements recorded. It is submitted that the copies of the statements were provided to the assessee only on 02.01.2015.

34. On receipt of the statements, it was found that such statements were recorded by either from the employees or from the Managing Director. The content was clarified by filing affidavits. Copies of the affidavits were filed before the CIT (A) along with an application for admission of additional evidence. The said evidence was admitted by the CIT (A) and was forwarded to the Assessing Officer for remand report. The DCIT, Central Circlc-1(2) and the Addl CIT Central Circle, Range-1 submitted the remand report. The Assessing Officer and the Addl.CIT did not comment on the affidavits submitted by the assessee. No contradicting evidence was brought in either by the Assessing Officer or by the Addl.Commissioner in the remand report. In the circumstances, the affidavits filed by the assessee during the course of appeal proceedings should have been taken cognisance of and the material facts contained therein should have been considered before the appeals are decided The learned DR should have considered the affidavits filed and considered the facts contained therein. Instead, the learned CIT / DR referred only to the statements and not to the affidavits.

35. Therefore, the mention by the Learned CIT DR about the statements without considering the affidavits should not be considered.

36. It is humbly submitted that the statements were recorded by the DDIT and not by the Assessing officer. Even during the course of assessment proceedings, neither the Assessing officer nor the Addl. CIT recorded the statements of the witnesses i.e. Sub-contractors and the staff of the assessee. The assessee humbly submits that when the remand report was provided to the assessee, the assessee filed a detailed written subMIssion which is at pages 86 to 91 of the common paper book containing the sworn statements and affidavits. In the said explanations the assessee submitted in detail as to why the statement should not be considered and as to why the affidavits are required to be considered. It was also submitted that during remand proceedings

the AO did neither deny nor counter the content of the affidavits filed. On the other hand, the Addl CIT in his report dated 17.12.2015 at page No.76 of the common paper book mentioned that "there is no specific reference" in any other seized diary / documents depicting the backward flow of money. The Addl CIT continued to mention that at least the AO's remand report does not mention any such evidence. The observation of the Addl. CIT about backward flow of money would clarify that there was no evidence to the effect that the amount paid by the assessee through RTGS to the sub contractor did not flow back ward and was not received by the assessee company.

37. The CIT DR relied on various statement to say that the amounts were given back to the assessee. It is submitted that the observations of the learned CIT-DR are not correct. Sri A. Chandrakanth Reddy in his statement dated 23.2.2012 (Page No. 334 of the DPB) stated that " I Submit that I supplied stone and dust at the site office of IOCL at Paradip and paid my suppliers by drawing cash from my Hyderabad bank account. I therefore, deny your conclusions". This would clearly indicate that the sub contract given to Sri Chandrakanth Reddy is true.

38. Similarly, the statement of Sri S. Janardhan Reddy may please be examined. In response to a question No.33 put to him, he stated (page No.320 of DPB)as under :

> *"I submit that I supplied stone and stone dust at the site office of IOCL at Paradip and paid my supplies by drawing cash from my Hyderabad bank account. I, therefore, deny your conclusions".*

The above facts are obtained from the statement recorded on 27.2.2012.

39. The fact that the assessee sent (the amount through RTGS is not in dispute. This fact was stated by them in the affidavits which were not countered by the Assessing officer and the Addl. CIT in their remand reports.

40. In so far as the statement of Sri D. Sridhar Reddy is concerned, he also filed an affidavit before the authorities and the same was sent for remand report by the CTT (Appeals). The affidavit was admitted as an additional evidence by the CIT (Appeals). Neither the Assessing officer nor the Addl. CIT countered the content of the affidavit of Sri D. Sridhar Reddy.

41. It is humbly submitted that the learned CIT -DR relied on the statements that the M.D accepted for additional income of Rs.75

crores in all. In this regard it is humbly submitted that out of 75 crores, about 11.61 crores relate to Smt. D. Aparna , his wife. Whether the said amount is liable to be taxed or not is a legal issue to be decided by the Hon'ble ITAT in the appeal filed by her which is pending before the Hon'ble ITAT. it is not an income by itself. It is a liability incurred by her by providing lands on lease to the company in which she is a Director. The question of taxability need to be examined in detail. However, in the statement, Sri Sridhar Reddy admitted the same as income for the assessment year 2011-12. This fact shows that Sri D. Sreedhar Reddy was in a confused state when the declaration was obtained by the department.

42. The said amount of Rs.75 crores also includes Rs.8.22 crores being deemed income in the assessment of Sri D.Sridhar Reddy which represents income u/s 56 of the I.T.Act. The shares were received from the HUF of his maternal uncle. The question whether they are taxable u/s 56 is a legal question. This was also accepted by Sri Sridhar Reddy without verification. Similarly, even in the case of the assessee he accepted some amounts without reference to any seized material. There is no seized material supporting the admission. The Assessing Officer provided copies of the statements recorded on 2.1.2015 and the same were examined. On detailed examination, it was seen by the assessee that the admission is not correct. The company was allotted sub contract works by reputed companies/government/government bodies. Such works were in turn were allotted to the sub contractors either on back-to-back basis or partly. The assessee is submitting details of the work orders taken by the assesee; the details of the principal contractors and the payments made to sub-contractors. This fact also shows that the statement of Sri Sridhar Reddy was taken when he was in a confused state Therefore, he filed an affidavit before the CIT (A) explaining the circumstances in which the statement was recorded and the circumstances under which the additions accepted cannot be considered as correct. This is particularly so, when the Assessing Officer and the Addl.CIT in their remand reports did not counter the contents of the affidavit.

43. The learned CIT-DR at para 6 of the written subMIssions mentioned that anomalous features are noticed with regard to payments made to the sub contract works and suppliers. They are discussed in the follow8ing paragraphs.

44. In clause (a) of para 6, the learned CIT-DR mentions that the alleged sub contractors are men of meagre means.

45. The sub contractors are separately assessed to tax. They filed returns of income. The Assessing Officer resorted to estimation of income from the sub contract receipts. He is satisfied with the

sources of funds available with them and also satisfied himself about the figures contained in the balance sheet. This clearly indicates that the sub contractors are capable of executing the sub contract works. It is submitted that all the sub contractors were examined; their accounts are available before the Assessing Officer. All of them have accepted that they carried out the sub contract works. In such circumstances, the observations of the learned CIT-DR is not justified.

46. The learned CIT-DR mentions that there is no proof that the sub contractors carried out the contract works for others. This is baseless allegation. The principal contractor paid the bill only when the work was done. Such work was rendered by the sub-contractors.

47. The learned CIT-DR mentions that the tax audit reports mentioned appear to be back dated. This type of allegations should not be considered by the Hon'ble Tribunal particularly when the AO and additional CIT in their remand report submitted that the return of income were filed by the sub-contractors prior to the date of search. In fact, they were examined by the Assessing Officer and the CIT (A) and orders were passed.

48. The learned CIT-DR expressed a doubt that two of the sub contractors approached one ITP at Nandyal one Sri Gopal. It is not known as to how such a fact would disprove the genuineness of the transactions. There are several sub contractors out of them two have approached an Auditor for filing the returns of income. It cannot be considered as the basis for doubting the genuineness of the transaction.

49. In clauses (b) and (c) of para 6, the learned CIT –DR mentions that the employees of the assessee withdrew the amount in cash by depositing self cheques. It is submitted that –

a) *The employees did not withdraw cash from the bank and the sub contractors alone have withdrawn the amount;*
b) *The employees have signed as a witness facilitating the withdrawal and the amounts were taken by the sub contractors and was spent by the sub contractors themselves.*

50. As stated earlier, in the statements of sub contractors, they have categorically mentioned that they withdrew the amounts and spent the amount. For the purpose of company's work. Therefore, the observations made by the CIT-DR are not correct particularly in view of the statement of the sub contractors recorded by the department.

51. In clauses (d) of para 6, the CIT-DR expressed doubt about the purchase of stone and stone dust from different concerns. In this regard it is categorically mentioned by the sub contractors that they supplied the goods; that they withdrew the amount and paid the same to the suppliers. Both the persons were examined on oath. They stated categorically all the details. Further, a suggestion was made to them by the ADIT regarding the statement that the transaction is not genuine. In response they stated that the transaction is genuine. These facts clearly indicate that the observations made by the learned CIT-DR are incorrect.

52. In clause (c) of para 6, the learned CIT-DR doubted carrying of huge cash from Hyderabad to work spot. The persons have explained as to how they carried the money after withdrawal from bank at Hyderabad to the work spot. It is possible that a person has withdrawn the money and carried the money to the work spot. The doubt of the CIT-DR is without any basis.

53. In clause (f) of para 6, the learned CIT-DR mentions that the sub contractors did not maintain any books of account. In this regard, it is submitted firstly that this is not relating to the assessee. In so far as the assessee is concerned, it maintained books of account. The Assessing Officer has chosen to estimate the income at 12.5% rejecting the books of account. The learned CIT (Appeals) upheld the estimation of income by rejecting the books of account. In all the cases of sub contractors, the books are rejected and income is estimated.

54. The learned CIT-DR mentions that RA bills are nothing but self-serving documents. This is not correct. The bills and vouchers were part of seized material. The assessee based on the RA bills of the sub contractors raise a bill against the principal contractor. The principal contractor, after the explanations, accept or measure the work and pay the money to the assessee. The RA bills support the claim of the assessee made before the Principal contractor. It supports the claim of the assessee and bills were raised against the principal contractor. In such circumstances, it is not correct for the learned CIT-DR to say that it is a self serving document. The learned CIT-DR should have considered the fact that based on the bills raised, the amount were sanctioned by the principal contractor to the assessee. This fact would clearly indicate that the RA bills are important and support the claim of the bills from the principal contractor.

55. The learned CIT-DR mentions about the proof for meeting the requirements of Sec.40A(3) and Sec.40(a)(ia) of the I.T.Act. in the case of the sub contractors, as submitted in the earlier paragraphs, the Assessing officer estimated the income rejecting the books of account and, therefore, there is no requirement to look

into the disallowance either u/s 40A(3) or u/s 40(a)(ia) of the I.T.Act. In this regard a reference may kindly be made to the assessment order passed by the Assessing officer in the case of the sub contractors. Invariably, the assessments in the cases of the sub-contractors were completed on an estimate basis which clearly indicate that there is no requirement for disallowance u/s 40A(3) or Sec.40(a)(ia) of the I.T. Act.

56. The learned CIT-DR mentions that the suppliers to the sub contractors are unidentifiable persons. The observation of the learned CIT-DR is MIsplaced. There is no requirement in the case of the assessee to look into the details of the supplies to the sub contractors. Firstly, the principal contractor accepted the fact that he ordered for stone and stone dust; rate was fixed by the principal contractor; the assessee placed the order on the sub contractors for supply of the said stone and stone dust by adding his margin. Such supply was made; the principal contractor paid the amount and the assessee in turn paid the amount to the sub contractor. In the circumstances, it is humbly submitted that the observations of the learned CIT-DR are MIsplaced and do not constitute any supporting evidence for his subMIssions.

57. The learned CIT-DR mentions that the supplies were made on credit basis on the credibility of IVRCL. This is a hypothetical view of the learned CIT-DR and the real facts are on record. The learned CIT-DR cannot sit in the judgment seat of the principal contractor and say what he should have done. What was done is required to be examined by the authorities for determining the income and cannot visualise or imagine what should have been done.

58. In clause (h) of para 6, the learned CIT-DR mentions that no evidence for purchase or supply of the material of 1.50 lakh cubic metres was made available. In this regard it is submitted that the sub contractor was examined on oath and all the information necessary was provided by him to the ADIT. The supplier stated before the ADIT that the trip sheets are available with him and the trips were noted by IVRCL He also stated that he had no contact with the persons supplying the goods after the supplies were complete.

59. The learned CIT-DR mentions that none of the sub contractors showed compliance in their respective assessment proceedings. This is not justified. They filed the returns of income. Their assessments were completed and the appeals filed by them are before the Hon'ble ITAT. It is submitted that the Managing Director of the company produced the sub contractors who were requisitioned by the ADIT and all of them have stated that they received the amount. In so far as cash withdrawals in

the case of the sub contractors is concerned, the ADIT examined the sub contractors; they have stated that they have withdrawn the money, carried the same to the work place. They never stated that they gave the amount back to the assessee. In this regard the mention that an amount of Rs.138.37 crores was withdrawn in cash over a period of time would not help the learned CIT-DR in any way. In so far as the assessee is concerned, the payments were made through RTGS/account payee cheques. They were never paid in cash. The withdrawal by the sub contractors was accepted by the sub contractors and they categorically stated that these amounts were utilized for the purpose of the business. There is no reason for the learned CIT-DR to state that the expenditure incurred on payments to the sub contractors is not genuine.

60. In clause (1) of para 6, the learned CIT-DR mentions that the transactions are in the special knowledge of the MD and CFO and that the MD disclosed a sum of Rs.55.17 crores and furnished the year-wise break up. It is submitted that the MD filed affidavit clarifying as to how he gave admission of Rs.55.17 crores. The learned CIT-DR mentions that the disclosure was made in the year 2011 and the retraction was afterwards. It is humbly submitted that the copies of the statements recorded are provided much later and immediately on receipt of the copies of the statements on 2.1.2015, affidavit were filed. The learned CIT-DR is not justified in mentioning that the withdrawals made by the sub contactors were utilized for the purpose of making cash payments. This is not justified as neither the Assessing officer nor the CIT (Appeals) made any comment about the same.

61. The learned CIT-DR mentions that the amounts paid to the persons should be treated as income u/s 69C of the I.T. Act and deduction u/s 80IA(4) shall not be allowed on the said amount. In this regard the assessee humbly submits that no payments as presumed by the CIT-DR were made by the assessee. Further, the assessee company did not debit any expenditure which is not allowable as a deduction.

62. The Assessing Officer at the time of assessment did not find any expenditure which was not explained by the assessee and no such addition u/s 69C was made by the Assessing officer. The learned CIT-DR cannot make a new case for the department but has to argue the issues raised by either the Assessing officer or the CIT (Appeals), no fresh issue can be raised before the Hon'ble ITAT by the learned CIT-DR.

63. The learned CIT-DR submitted a list of cases in support of his arguments. The said list was provided on 12.6.2019. These

decisions which are in connection disallowance of sub contract payments are discussed hereunder:

(1) <u>ITAT, Ahmedabad in the case of N.K. Proteins Ltd. Reported in 83 TTJ Ahd 904:</u>

At para No.62, the Hon'ble Tribunal found that

"it is incumbent on the assessee to prove that the suppliers were genuine suppliers of cotton seed oil and they really supplied the raw material to the assessee. Such a burden had to be discharged by the assessee with very strong, cogent and clinching evidence in view of blatant denial by all the five parties coupled with the varius other circumstantial evidence referred to in the assessment order".

The facts stated by the Hon'ble Tribunal clearly indicate that the suppliers have denied the supply of cotton seed oil. In the case of the assessee it is totally different. There is no denial from any sub contractor. Further, in the said case as mentioned by the Hon'ble Supreme Court 25% of the total purchases were added and not the entire amount.

The assessee humbly submits that the decisions of the Hon'ble Tribunal, High Court and Supreme Court are distinguishable on facts in as much as in the case, the purchasers denied having supplied the goods.

(2) <u>Decision of the High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd., reported in 86 taxmann.com 69.</u>

The said decision is rendered in a case where the assessee filed a Writ Petition against the order u/s 147 of the I.T. Act.

(3) <u>Decision of the High Court of Rajasthan in the case of Bright Future Gems reported in 88 taxmann.com 476:</u>

This decision has no relevance to the facts of the assessee's case. It is distinguishable on facts. In the said case, the assessee is required to prove the purchases and the Assessing officer required the assessee to prove the physical delivery of material.

In so far as the assessee is concerned, it is a sub contract payment made as per the agreement and the assessee proved the fact that the work entrusted to the sub contractor was completed and the principal contractor paid consideration.

(4) <u>The decision of the High Court of Calcutta in the case of Kalyani Medical Stores reported in 80 taxmann.com158:</u>

This decision has no relevance to the facts of the assessee's case. It is distinguishable on facts. In the said case, the assessee is required to prove the purchases. The assessee failed to prove the genuineness of the purchases.
In so far as the assessee is concerned, it is a sub contract payment made as per the agreement and the assessee proved the fact that the work entrusted to the sub contractor was completed and the principal contractor paid consideration.

(5) <u>Decision of ITAT Mumbai in the case of Soman Sun City in ITA No.2960/Mumi2016 dated 23.10.2017:</u>

This decision has no relevance to the facts of the assessee's case. It is distinguishable on facts. In the said case, the assessee is required to prove the purchases. Assessing Officer made the addition by applying the provisions of Sec.69C of the I.T. Act. It is not a sub contract.

In so far as the assessee is concerned, it is a sub contract payment made as per the agreement and the assessee proved the fact that the work entrusted to the sub contractor was completed and the principal contractor paid consideration. The facts in the assessee's case are different.

(6) <u>Decision of High Court of Bombay in the case of Shoreline Hotel Pvt. Ltd., reported in (2018) 98 taxmann.com 234 dated 11.9.2018:</u>

In the said case, the assessee , a hotel recorded certain purchases from the concerns who are declared by the Sales Tax authorities as engaged in providing bogus purchase bills. In so far as the said case is concerned, the facts are different, the purchases were effected from the concerns which were declared as concerns issuing bogus sale bills.

In so far as the assessee is concerned, it is a sub contract payment made as per the agreement and the assessee proved the fact that the work entrusted to the sub contractor was completed and the principal contractor paid consideration.

(7) <u>Decision of the ITAT, Kolkata Bench in the case of Sun Steel Industries Pvt. Ltd. Vs DCIT in ITA No.531/Kol/2016 dated 19.2.2018:</u>

The assessee is in the business of fabrication andgalvanizing and erection of transMIssion towers. It claimed payment of Rs.37 lakhs to the sub contractors. The Hon'ble Tribunal found that the sub contractors are in the business of trading in shares and investments and that, therefore, there is no expertise for providing infrastructure. In the case of the assessee when two of the sub contractors were examined, they stated that they are engaged in the business of construction.

(8) <u>The decision of the High Court of Punjab and Haryana in the case of Narender Kumar Gupta, reported in (2015) 55 taxmann.com371 dated 8.1.2015:</u>

In the above case, the authorities found that in respect of some of the purchases, there is a variation in the name of the party on voucher and on corresponding bill, etc.

The Hon'ble High Court found that the material gathered had to be placed before the Assessing officer and the Assessing officer has to probe all the material before the net profit is estimated by the Hon'ble ITAT. The facts are distinguishable.

(9) <u>The decision of the High Court of Andhra Pradesh in the case of R.B. Mittal Vs CIT reported in (2000) 112 Taxman 480 dated 4.8.2000.</u>

In the said case, the issue is with regard to the discharge of the burden enforced on an assessee u/s 68 of the I.T.Act. The Hon'ble High Court is of the view that no question of law arises when the Tribunal found that based on the evidences the claim that certain parties advanced amounts is found to be non genuine. The burden of proof as required u/s 68 is totally different than the claim of expenditure. In the case of the assessee the question is allowability of the sub contract payments made. The assessee proved beyond any amount of doubt that the sub contracts were given and the works entrusted were all genuine. Therefore, the facts are distinguishable.

(10) <u>The decision of the High Court of Madras and the Supreme Court in the case of B. Kishore Kumar Vs DCIT, Chennai.</u>

In this case , addition was made by applying the provisions of Sec.69A of the Income-Tax Act. The assessee admitted that he had separate business income which was not disclosed to the department and that the investments were made from out of the same. The facts in the said case

are different to the facts ascertained in the case of the assessee.

The said person also agreed that the income remained in the outstanding loans which has to be recovered alongwith interest. The Hon'ble High Court also found that the case was decided by the Tribunal on the basis of sworn statement of the assessee and the admitted documents. The assessee in the said case also submitted that certain business was carried on which was not disclosed; that such amounts were outstanding; that interest @ 18% was collected from such outstanding balances. The Assessing officer made addition of 18% of such outstanding amount which is confirmed by the department. The circumstances in the case of the assessee are totally different and are distinguishable.

(11) <u>The decision in the case of Hotel Kiran Vs ACIT reported in 82 ITD 453 (Pune):</u>

In the said case, the Hon'ble Tribunal held that admission is a good piece of evidence and is not conclusive. It is further observed as under:

> *"However, there are exceptions to such admission where the assessee can retract from such admission. The first exception exists where such statement is made involuntarily, i.e., obtained under coercion, threat, duress, undue influence, etc. But the burden lies on the person making such allegations to prove that statement was obtained by the aforesaid means. The second exception is where the statement has been given under some MIstaken belief either of fact or law. It is well-settled that there cannot be estoppel again the law. If a person is not liable to tax in respect of any receipt, he cannot be made liable to pay tax merely because he has agreed to pay the tax in the statement under section 132. He can always retract in such situation if he can show that the statement has been made on MIstaken belief of facts, he can retract from the statement if he can show that facts on the basis of which admission was made are incorrect".*
>
> *In the case of the assessee, the circumstances explained by the assessee would clearly indicate that the admission is made under MIstaken impression. In fact, in some of the cases, the sub contracts were given on back to back basis and the entire work was got done through sub contractors. In such circumstances, it cannot be said that no sub contract*

work was done. Therefore, the decision of the Hon'ble Tribunal of Pune Bench works in favour of the assessee to the extent mentioned above.

(12) <u>The decision of the High Court of Andhra Pradesh in the case of Kermex Micro Systems (India) Ltd. Reported in (2014) 47 taxmann.com 375 dated 2.1.2014.</u>

In the said case, the addition was made by applying the provisions of Sec.69C of the I.T Act. In the said case, the assessee did not retract at the time of assessment. He admitted additional income by making voluntary disclosure. He paid tax. Before the CIT (Appeals) the issue was raised without even raising a ground of appeal. The circumstances in the said case are totally different.

64. In view of the above submissions, the observations made by the Assessing officer, the learned Commissioner of Income-Tax (Appeals) and learned CIT-DR may please be rejected and the addition made by the Assessing officer towards disallowance of sub contract payments may kindly be deleted."

10. Ld. DR, on other hand, also filed written submissions, which are as under:

"6. It is humbly submitted that the following anomalous features are noticed with regard to payments made to the alleged sub-contract works and suppliers:

a) The alleged sub-contractors are of men of meagre means and there is no proof that they executed any sub-contractors or contracts for others. The concerns were not found at the given addresses, not operated from the said address and the income tax returns are also filed only at the instance of the assessee. The tax audit reports in applicable cases also appear to be back dated. It is strange to notice that two independent sub-contractors claim to have contacted Mr. Gopal an ITP at Nandyal after a long time elapsed for filing of returns though they have no work or business at Nandyal. Yet, a claim is made that they have executed the work worth Crores of rupees. In case of one of the alleged sub-contractors, the managing partner does not even properly identify the other partners.

b) Immediately after payments are made by the assessee to the alleged sub-contractors, employees of the assessee withdrew the amounts in cash by depositing self cheques issued by the sub-contractors. It is claimed that these amounts running into Crores of rupees are allegedly kept in the custody of the employees before handing over the money several months later to the alleged sub-contractors. However, as per the Statements of the employees, the amounts were handed over to Shri AVKS Prasad, CFO and Shri M. Chandra Sekhar Reddy. Two of the employees (Mr K. Ajay Kumar and Mr. T. Shankar) who withdrew cash did not even know Mr A.

Chandrakanth Reddy or Mr. S. Janardhan Reddy, the alleged sub-contractors. No credible proof of handing over the cash to the alleged sub-contractors is shown. The subsequent retractions through affidavits filed before learned CIT(A) in February, 2015 are nothing but an afterthought to evade taxes.

c) Almost all the cash withdrawals are done by employees of the assessee at the instance of MD or CFO and indicating systematic activity of siphoning off of cash in the name of expenditure paid to name lending sub-contractors and suppliers.

d) M/s IVRCL entrusted the work of purchase of stone and stone dust worth of about Rs 61.50 Crore to the assessee for the IOCL site at Paradeep, Orissa. The assessee claims that in turn it entrusted the work to the extent of Rs 43,90,75,000 to MIS Sushi Udyog Construction Company, MIs Spectrum Infrastructure and MIs J K Enterprises who are only name lenders as established during the search and post search enquiries. The amounts have been withdrawn in cash by the employees of the assessee and the cash was duly handed over to Shri D. Sreedhar Reddy, MD of the assessee and Mr. AKVS Srinivas, CFO of the assessee. There is a serious contradiction in the statements of the employees of the assessee as well as Mr. Sreedhar Reddy/Mr. AVKS Prasad on one hand and the sub-contractors on the other hand. While it is admitted by the first side that the amounts were withdrawn and handed over to the MD/CFO at their directions, the sub-contractors claim that the employees withdrew the amounts at their request and handed over cash to them. Which of the statements was correct was not explained by either side except for retractions in February, 2015 which are an afterthought as already submitted.

e) The alleged sub-contractors/suppliers claimed to have carried huge amounts of cash to distant locations to make payments to the vendors and service providers several months after the purchases or execution of labour work. Except for stating that they travelled by train and road, no proof is shown for carrying the cash and even the dates of travel are not specified.

f) Admittedly, the sub-contractors did not maintain any books of accounts and have no records or documents except those created by the assessee, which clearly shows that they are nothing but name lenders. As seen from the statement of Mr. Verma, some of the bills are fabricated by him at the instance of persons, whom he did not identify. The RA bills are nothing but self-serving documents. No proof of meeting the requirements of section 40A(3)/40(a)(ia) are shown by the alleged sub-contractors. As per their own claim, to meet the alleged expenditure, the alleged subcontractors/suppliers had to make several trips carrying huge cash to make payments.

g) The suppliers of the alleged sub-contractors are also unidentifiable persons. Except for two/three names viz., Prathikanta, Mohanti and Sahoo, no further details are furnished by the alleged sub-contractors/suppliers with regard to the purchases made by them for supplying material to the assessee. Though they made claims

that they stayed at IVRCL office, they do not know the names of site staff of IVRCL nor did they produce the trip sheets at any time. If the supplies are made by the unknown suppliers on the basis of credibility of IVRCL and when the alleged entities who supplied material to the assessee do not have presence at Paradeep, what was the need for IVRCL to purchase the material worth crores of rupees in cash through two layers of parties (who only lent their names and not even their physical presence was there) is not known.

h) For purchase and supply of stone and stone dust of 1.5 lakh cubic meters each, no evidence of purchase by the alleged suppliers of the assessee or payment is produced at any point of time in the assessment proceedings or appellate proceedings before the learned CIT(A). The mode of supply of material is also not established. If really the supplies were made, thousands of trucks would have been employed. It is common knowledge that even for reputed concerns, stone and stone dust are not supplied by the suppliers on credit basis.

i) It is also submitted that none of the sub-contractors showed compliance in their respective assessment proceedings. They have not produced any labour licenses as required under the law to carry out voluminous tasks of earth excavation works, which involve large number of labour. Nor did the alleged suppliers have any Sales Tax registration to supply material.

j) In case of remaining concerns also the fact that there were cash withdrawals immediately after making payments through RTGS was confronted to Shri D. Sreedhar Reddy in the course of his Statement u/s 132(4) on 29-12-2011. He did not produce the sub-contractors for verification. These alleged sub-contractors are also shown to have executed works at Karnataka, waited for payments for more than one year and immediate after payments are made into their accounts, the employees of the assessee withdrew the amounts in cash and handed over to the MD and CFO of the assessee. In the assessment proceedings also, the details were confronted to the assessee.

k) The material impounded during survey conducted at the office of the assessee at Bangalore on 30/11/2011, the statement of Shri K. Ramachandra Rao, director recorded during the survey as well as the statement recorded on the same day from Mr. Gani Verma during search clearly reveal that the assessee is engaged in systematic activity of inflating the expenditure to meet inadmissible cash payments. In his statement during survey, Mr. K. Ramachandra Rao, Technical director of the assessee admitted that payments were made in cash for award of contracts and for release of payments. The evidence was confronted to Shri D. Sridhar Reddy on 28/01/2012 during the course of search but he denied to have made such payments. The evidence impounded is available in the form of Annexure - A/SSIL/RO/l to 24. The payments which are listed at pages 221 to 2250f this paper book (only payments of Rs 50,000 and above were compiled) total to about Rs 16.75 Cr. This is a clear evidence that cash is siphoned off and part of it is used for illegal payments.

l) It is submitted that all these transactions are in the special knowledge of the MD and CFO of the assessee. The MD of the assessee disclosed Rs 55.17 Crores and furnished year-wise breakup on account of deficiencies in the works of sub-contracts/supplies. The disclosure was confirmed by him over a long period from 30/11/2011 to 19/04/2012. The directors of the assessee were also fully aware of the inconsistencies in the version of the sub-contractors, the fact of systematic activity of cash withdrawal, inflation of expenditure and making cash payments for inadMIssible expenses. If the inadMIssible payments were mere rough estimates, such estimates would not be made over a period of years unless such payments were actually made from time to time.

m) Without prejudice to the above, it is humbly submitted even if it were to be accepted that the supply of material was made or sub-contracts were executed, the expenditure incurred is from a source about which no explanation is offered (as the money siphoned off in the form of cash is not established to be the source) and therefore such expenditure has to be treated as income under the head "other sources" as per section 69(, Also, it cannot be subject matter of deduction u/s 80lA because it is in the nature of income from other sources u/s 69C.

7. All the above facts clearly indicate that the claims by the assessee and its associates are beyond the preponderance of human probability. Apparently, no payment was made to the alleged sub-contractors/suppliers and bogus expenditure was booked in the name of the alleged sub-contractors and suppliers. The assessee failed to discharge the onus of proving the expenditure. This fact was independently admitted by Shri AVKS Prasad, CFO and Mr D. Sreedhar Reddy, MD of the assessee, who confirmed the sametime and again. The subsequent retraction before the learned CIT(A) stating that the admission was under "confusion" is a mere afterthought to avoid taxes. This is because firstly, one cannot be in a confused state for months and secondly, no evidence is produced countering the evidence confronted to the assessee by the Department in the search, post-search and assessment proceedings. On the contrary, there is credible evidence to the fact that the assessee was making in adMIssible payments in cash for obtaining contracts and for release of payments. Also, when the transactions were confronted, there was clear admission that the money was used for expenditure which cannot be explained. It is humbly submitted that considering the quantum value of the transactions and the fact that they occurred over a long period of time, there is no way the persons behind these transactions like the MD and CFO would be in "confused state" as the activity is systematic and conducted with a view to siphon off cash.

8. In the face of mounting evidence of huge cash withdrawals by the assessee from the accounts of sub-contractors after transferring huge amounts to alleged sub-contractors, the claim that the work was completed to the satisfaction of the assessee by sub-contractors and the principal contractor accepted the works does not stand the

test of evidence because it is in the special knowledge of the assessee that what happened to the cash of crores of rupees and the assessee is unwilling to state the purpose for which it is used except for making vague statements that it was handed over to the alleged subcontractors/suppliers without producing credible proof.

9. Without prejudice to the stand that bogus expenditure is booked, it is humbly submitted that even if the expenditure were incurred in cash in violation of section 40A(3) by making cash payments to unknown or unidentified persons, the expenditure is to be disallowed in the hands of the assessee because the alleged suppliers/sub-contractors are only name lenders in a well thought scheme of tax evasion.

10. Even in the assessment proceedings of the alleged sub-contractors/suppliers, there was no compliance and the AO estimated the income in their cases on protective basis in the absence of compliance.

11. It is also humbly submitted that the case of assessee is not case of rejection of books necessitating estimation of profits and the additions are based on specific evidence unearthed in search proceedings. Therefore, the demand of the assessee to compute profits at a certain rate is not tenable in the eyes of law. In light of the above, the grounds raised by the assessee may kindly be rejected and the additions may kindly be sustained.

12. With regard to the appeal of the Department in relation to grant of deduction u/s 801A, it was not correct on the part of the learned CIT(A) to ignore the provisions of section 80AC, which clearly state that furnishing of the return before due date specified under section 139(1) is mandatory for claiming deduction u/s 801A. It is humbly submitted that but for the search operation, there was no way the assessee would have made a claim and a search operation cannot be used to advantage by the assessee to make claims which are . not made earlier. It is also submitted that neither the AO nor the assessee can seek unfettered jurisdiction in case of search assessments u/s 153A. In the case of Kabul Chawla (380 ITR 573), the Hon'ble Delhi High Court held (at para 37 of the decision) that "v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings".

13. Reliance is also placed on the decision of Hon'ble Supreme Court in the case of Sun Engineering Works Pvt Lt (198 ITR 297) and in the case of Chettinad Corporation Pvt. Ltd. Vs. CIT reported in (200 ITR 320) on the point that fresh claim of deductions cannot be made in reassessment proceedings. In the present case, the proceedings are in the nature of reassessment proceedings because the original assessments were concluded earlier for most of the years.The return in response to notice u/s 153A is also not filed within the time specified. In light of the above, it is submitted that a

search assessment cannot be used for the benefit of the assessee to make new claims of deduction in case of completed assessments because the search assessment is only a "reassessment" on the basis of material relate to search action u/s 132.

14. It is also submitted that it was also not correct on the part of the learned CIT(A) to remit the matter back to the AD for appropriate quantification for the purpose of deduction u/s 80IA though verification was done by the AD and remand report was submitted to the learned CIT(A). Such remittance back to AO is in fact in the nature of set-aside because the verification is not simple arithmetical verification and involves the assessment of each subcontract to ascertain whether it is in the nature of developer's work or not.

15. It is also submitted that in the case of Katira Constructions Ltd, the Hon'ble Gujarat High Court in its decision dated 04/03/2013 in SCA 11781/2009 held that deduction u/s 80IA is not applicable to a business in the nature of works contracts. It is humbly submitted that the contracts executed by the assessee are in the nature of works contracts as it does not carry any risk of the developer and the entire risk is carried by the Government in most of the cases. The assessee carries only a business risk which is present in case of all enterprises in general and there is no risk of developer in his case.

16. Without prejudice to the above, it is humbly submitted that even if it were to be accepted that the assessee carried out the works or purchases through the alleged subcontractors/suppliers, the source of meeting expenditure for such works or purchases is unexplained. In such a case, section 69C would apply and the entire amount of the unexplained expenditure has to be treated as income from other sources. Deduction u/s 80IA is not allowable on income under the head other sources as already submitted in above paragraphs. Reliance is placed on the decisions of Hon'ble Gujarat High Court and Hon'ble Supreme Court (which dismissed the SLP), wherein the decision of Hon'ble ITAT in enhancing the disallowance to 100% of the unaccounted purchases was sustained.

In light of the above, the Hon'ble ITAT may kindly allow the appeals of the Department and dismiss the appeals of the assessee."

10.1 The ld. DR heavily relied on the following cases:

1. N.K. Industries Ltd., [2016] 72 Taxmann.com 289 (Guj. HC)
2. B. Kishore Kumar, [2014] 52 Taxmann.com 449 (Mad. HC)

10.2 Also relied on the following cases:

1. N.K. Proteins Ltd., [2004] 83 TTJ 904
2. N.K. Proteins Ltd., 84 Taxmann.com 195 (SC)
3. Gujarat Ambuja Exports Ld., [2017] 86 Taxmann.com 69 (Guj. HC)
4. Bright Future Gems, Jaipur – II, 88 Taxmann.com 476
5. Kalyani Medical Stores, 80 Taxmann.com 158

6. Soman Sun citi, ITA No. 2960/Mumi16, dt. 23rd October, 17
7. Shoreline Hotel (P) Ltd., [2018] 98 Taxmann.com 234
8. Sun Steel Industries (P) Ltd., ITA No. 531/Kol/2016, dt. 19.02.18
9. Narender Kumar Gupta, [2015] Taxmann.com 371
10. RB Mittal, [2000] 112 Taxman 480
11. B. Kishore Kumar, [2015] 62 Taxmann.com 449 (Mad.)
12. Hotel Kiran, [2002] 82 ITD 453 (Pune)
13. Kermex Micro Systems (India) Ltd., [2014] 47 Taxmann.com 375
14. Jai Steel (India), Jodhpur, [2013] 36 Taxmann.com 523
15. Plastiblends India Ltd., [2017] 86 Taxmann.com 137 (SC)
16. K. Venkataramaiah Vs. A. Setharam Reddy & Ors., 1963 AIR 1526
17. ITO vs. B.N. Bhattacharya, 112 ITR 423
18. R. Dalmia Vs. CIT (Central), 113 ITR 522
19. Anaikar Traders & Estates Pvt. Ltd. Vs. CIT, 186 ITR 313

11. Considered the rival submissions and perused the material on record. From the records submitted before us, we notice that assessee is a civil contractor engaged in the development of infrastructure facilities. Assessee gets huge contracts from Government agencies and other agencies and assessee executes the above contracts by itself or allocates the same to sub-contracts on back to back basis. During the search proceedings, the revenue observed that the employees of the assessee company have withdrawn the cash from the various banks operated by the sub-contractors and the same was handed over to the higher officials of the assessee company. In post search proceedings, it was not denied that all the cash was withdrawn by the employees of the assessee company. As per the statements recorded from the Managing Director and CFO, they have accepted the above facts, but they reiterated that all these cash were utilized by the sub-contractors for the purposes of the business. From the submissions of the Ld. CIT-DR, it is emphasized that the sub-contracts do not possess

the required qualification and ability to carry out such huge activities by themselves. Ld. DR brought to our notice various short comings in the conduct of the sub contractors and their statements. The presumption applied by the tax authorities is that these sub-contractors are expected to be highly qualified and are expected to conduct business in an organized manner. It is pertinent to note that the department has not found anything during search that these contracts were bogus or that they have not carried out any work at all, except presuming that these were bogus transactions fully relying on the circumstantial evidence because the employees of the company extended their facility in withdrawing the cash and they made available such cash payments for the purpose of sub-contracts. Other than that department has not found anything nor they found huge cash in the possession of the employees or in the company to establish that these cash were only intended for the utilization in the business of the assessee other than sub-contract purpose.

The nature of sub contracts work depends upon the industry to industry, in infrastructure, sub contractors role is only a part of bigger project. It is important to note that contract work in infrastructure business is always huge and it requires extensive planning and execution team. In this line of business, huge contracts are divided into smaller contracts and these contracts are awarded to sub-contractors. Mostly it involves working with unorganized sector. The assessee has completed the contracts themselves and some contracts were awarded to sub-contractors on back to back basis. It is pertinent to note that the contracts awarded to sub-contractors are always relating to execution of excavation or filling of land, which are always regarded as work of unorganized sector. And the work executed

by the sub-contractors are categorized of this nature. The assessee has submitted before tax authorities that all these works were completed and the assessee has raised respective bills and got compensation for the same. The execution of the work is important and how they executed is the issue before us and the facility extended by the assessee to sub-contracts in withdrawing the cash is also under scanner.

11.1 In our view, considering the submissions and peculiarity of the industry under consideration, there are two types of sub-contracts depending upon the nature of works to be executed. They are independent sub-contractors, who execute the work independently and submit the bills with the proof of completing the work. Whereas, the second type are dependent sub-contractors, who are well versed with the execution of technical side but are lacking in administration. Further, the dependent sub-contractors heavily rely on the technical support as well as administration support in executing the work. It is not secret nowadays that the companies resort to employing sub-contractors to save cost of employment as they need not have to pay huge compensation to employees. Further, there would be difficulty in employing workers in remote areas.

11.2 As stated above, these contractors employed by the assessee may not possess the qualities of independent sub-contracts but they rely heavily in the main contractor to certify the work and in this line of business, the contractor has to work in remote areas where there is involvement as well as requirement of cash in huge. The work settlements are mostly and commonly in cash.

11.3 It cannot be denied that in cases of such dependent sub-contractors, the assessee might have extended the facility of withdrawing the cash on behalf of sub-contractors and even

they must have helped to transfer the same to the remote areas. It is pertinent to note that the assessee has extended the service only to withdraw the cash which was signed and authorized by such sub-contractor. Assessee must have employed set of people only to extend the above facilities to the dependent sub-contract. It is not illegal to extend the above facilities as they are in the interest of the assessee's business.

11.4 Whether such huge cash can be kept with the senior level executive or lower level executive? In our view, the cash being under the direct control of the senior level executives is proper.

11.5 The next question will be, whether the cash was utilized for the purpose of sub-contract or for any other purposes? It is not brought on record by the revenue department that these were utilized for any purpose other than sub-contract work. Here, what is relevant is, the works allotted to the sub-contractors were executed and certified by the respective engineers of the assessee. The work was compensated to the assessee by their respective contractee. This shows that works were executed by the dependent sub-contractor. Since, the works involve settlement by cash only. Therefore, it can be presumed that this cash was utilized in executing the work contract. The contract involves both work as well as supply of stone and stone dust. Since all these transactions are carried out in remote areas, the sub-contractors commonly would settle only for cash payments. It cannot be ruled out that cash were supplied to such places by the sub-contractor themselves or was helped by the assessee.

11.6 Assessee has submitted a combined statement for execution of contract work, the same are given below for the sake of clarity:

Project: a) Megha – for earthwork excavation for laying MS Pipeline concrete pedestals at required intervals and back filling of trench. b) Krishnapatnam Port c) Ratna SRMC

Executed in AY 2008-09;

Value : Rs. 24.07 crores

Sub-contract – Sushi Udyog Constructions–Rs. 9.92 crores
- Siri Engg. – Rs. 4.36
- B. Narasimha – Rs. 1.49 crores
- Rs. M. Krishna – Rs. 0.50 crores
- T. Srinivas - Rs. 1.02 crores
- Surya Erectors – 2.50 crores
- Gee Constructions – Rs. 0.39 crores.

d) Execution of hard rock excavation for the foundations at our Chitrapuri Housing Project, at all depths as per the drawings upto the foundation level.

Executed in AY 2010-11
Value – Res. 4.20 crores

Sub-contact – Sushi Udyog Constructions –
Rs. 1.68 crores

e) Multi villages rural water supply scheme to Nagari and 5 other (Phase 1 & 2) villages of Mudhoi Taluq of Bagalkot District.

Executed in AY 2011-12
Value – Rs. 10 crores.

Sub-contract – JK Enterprises – Rs. 1.51 crores.

All the above works were completed by the assessee with the assistance of sub-contractors.

11.7 It is not brought on record by the revenue that the works were never executed by the assessee, but on the other hand assessee has brought on record to demonstrate that the works were actually executed and that they received the compensation. Further, all the sub-contractors confirmed that they executed the work and got the compensation. It may not have managed in a professional manner as an independent sub-

contractor but were executed with the full support and supervision of the assessee. The assessee also followed the same procedure in recording the above transaction and due settlement according to the due process as per law after deducting tax dues. Further, we cannot doubt about the execution of work. How it is carried out depends upon the comfort level of the contractee. In the given case, assessee has extended facility of withdrawing the cash and organized it in such a way, to allow the sub-contractor to utilize the cash at the appropriate time. In absence of any proof that assessee has utilized the same for any purpose other than the sub-contract business, we are inclined to accept the contention of the assessee that the cash was in fact handed over to the respective sub-contractor and utilized by them in executing the work.

11.8 It is not the case of revenue that assessee has not completed the contract work, which was allocated to sub-contractors but for the cash management of the sub-contractors requirement, the whole sub-contract payments were disallowed. But as per records, assessee has executed the works assigned to sub-contractors and got the compensation. We further observe that Ld CIT has not confirmed the addition based on any evidence of utilization of cash only by assessee but heavily relied on the human probabilities and presumptions.

11.9 However, since there is certain element of uncertainty in utilization of such funds only in the sub-contract activities, we are inclined to direct the A.O, for the sake of justice, to disallow 5% of the total cash withdrawn by the sub-contractor with the assistance of assessee. Further, we propose to freeze the income earned by the sub-contractor @ 5% as the normal profit in this line of business. By this, we are technically upholding 10% of the sub-contract revenue as income.

Accordingly, grounds raised by the assessee on this issue are partly allowed.

12. Let us now consider the Revenue's appeals for the respective A.Ys. 2009-10 to 2012-13 against the order of the CIT (A)-II, Hyderabad, dated 30.03.2017 and the order of CIT(A) – II dated 19/10/2018. Appeals filed by the department against the orders dated 10/10/2018 of CIT(A) -II, Hyderabad are to the effect that the assessee is not entitled for deduction u/s 80IA of the IT Act.

12.1 As stated in the above paragraphs, during the assessment proceedings u/s 143(3) r.w.s. 153A of the Act, the AO noticed that consequent to search operations, a notice u/s 153A dated 5.5.2012 was issued calling for the return of income giving 30 days' time to furnish the same and that the said notice was acknowledged on 10.12.2012 and therefore, according to the AO, the return ought to have been filed on or before 9.1.2013 but the assessee filed the returns on 14.2.2013 with a delay of 36 days and that too the very same old returns were filed also in response to the notice u/s 153A of the Act. Therefore, he held that the returns were not filed within the period specified in the notice given u/s 153A of the I.T. Act. Thereafter, the assessee filed a revised return on 6.2.2014 making a claim u/s 80IA of the Act for the first time. The AO held that the return filed u/s 153A was not a valid return because it was filed belatedly and further that the AO did not have the power to condone the delay. Further, the AO held that the fresh claim u/s 80IA made in the revised return filed u/s 153A of the Act on 14.02.2013 is therefore, not entertainable as a revised return is not provided for under Chapter VIA of the Act. It was also observed that the audit certificate in form 10CCB annexed to tax audit report in form 3CEB filed along with the

return originally filed u/s 139(1), clearly stated that the deduction available under Chapter VIA as "nil" and therefore, the requirement of audit certificate remained to be complied with. He further observed that the assessee cannot be considered as a developer of infrastructure, but was a mere contractor and therefore, is not eligible for deduction u/s 80IA of the Act. Finally, he observed that the proceedings u/s 153A are for the benefit of the Revenue and therefore, it is not permissible for the assessee to introduce fresh claim in assessment proceedings initiated post search by service of notice u/s 153A of the Act. Thus, the AO did not allow the claim of deduction u/s 80IA of the Act. Aggrieved, the assessee preferred an appeal before the CIT (A) who allowed the same and the revenue is in appeal before us by raising the following grounds of appeal:

> " *1. Whether on the facts and in the circumstances of the case, and in law, Id CIT(A) was correct in granting deduction u/s.80IA of the Income Tax Act, 1961 disregarding the fact that such claim was made for the first time in the Return of Income filed in response to notice u/s.153A of the Income Tax Act, 1961 being not a legitimate claim.*
>
> *2. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) failed to appreciate that the provisions under section 80AC requiring the assessee to furnish the return of income before due date specified under section 139(1) is mandatory and not directory and same cannot be extended to return filed u/s 153A.*
>
> *3. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in holding that there is no legal sanction for the time limit prescribed by the AO in the notice u/s 153A without appreciating that the section 153A itself empower the AO to prescribe the period within which such return is to be filed by the assessee and thus the return filed after prescribed time has been rightly treated as belated and thus the return filed u/s 153A is to be governed by the provisions of section 139(4) which precludes the assessee from filing any revised return.*

4. Whether on the facts and in the circumstances of the case, the CIT(A) failed to appreciate that the assessee failed to obtain report of Audit in Form 10CCB on or before the due date as specified in section 139(1) of the Act and failed to furnish the report of such Audit with the return filed u/s 139(1) or return originally filed u/s 153A as required u/s 80IA(7) read with Rule 18BBB.

5. Whether on the facts and circumstances of the case, and in law, the Id. CIT(A) erred in allowing the claim of deduction u/s 80-IA which was made first time in the return filed u/s 153A without appreciating the fact that the provisions of section 153A could not operate to advantage of the assessee, who chose not to make a claim in the manner lawfully open to it u/s 139(1) or 139(5) of the Act.

6. Whether on the facts and circumstances of the case, and in law, the Id. CIT(A) failed to appreciate it is not open for the assessee to use another proceedings under section 153A of the Act to reopen the concluded assessments.

7. Whether on the facts and in the circumstances of the case, and in law, the Id C!T(A) was correct in allowing deduction ujs.80lA of the Income Tax Act 1961 though the assessee was only a civil contractor and not engaged in (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility?"

8. Whether on the facts and circumstances of the case, and in law, the Id. C!T(A) erred in a not appreciating that the c1arificatory amendment to section 80IA of IT Act (Explanation 2 to Section 80IA vide Finance Act 2007) excluded business in the nature of works contract which is exactly the case of the assessee.

9. Whether on the facts and circumstances of the case, and in law, the Id. CIT(A) erred in its assumption that the assessee is a developer without any basis and without even referring to the terms of the agreement entered into by the assessee and without even adverting the findings of the Aa on the issue.

10. Whether the Ld.CIT(A) erred in law in not adjudicating the matter and directing the AO to

examine the issue afresh with reference to each contract with regard to drawing, design and implementation, etc. though the same was already verified by the Aa in remand report.

11. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary".

13. The learned DR supported the order of the AO while the learned Counsel for the assessee supported the order of the CIT (A) and also placed reliance upon the following case law:

i) I*TAT Hyderabad Bench in the case of ACIT vs. P. Madhusudan Reddy in ITA Nos.1070 to 1075 and 1373 to 1375/Hyd/2012*

ii) ITAT Hyderabad in the case of KNR Constructions vs. DCIT in ITAT Nos.946 to 948 and 983 to 986/Hyd/2015.

iii) ITAT Chennai in the case of ACIT vs. V.N. Devadoss (2013) 157 TTJ 165 (Chennai Trib.)

iv) Hon'ble Kerala High Court in the case of Chirakkal Service Coop. Bank Ltd vs. CIT (2016) 384 ITR 490 (Ker.)

v) ITAT Ahmedabad Bench in the case of Parmeshwar Cold Storage (P) Ltd vs. ACIT (2012) 49 SOT 67 (Ahd.) (URO)

14. For the A.Y 2012-13, the provisions of section 153A are not covered as the search was conducted on 30.11.2011 and the revised return of income was filed within the time allowed u/s 139(5) of the Act.

15. Having regard to the rival contentions and the material on record, we find that the restrictions to making the claim u/s 80IA are prescribed u/s 80AC of the Act which reads as under:

"Deduction not to be allowed unless return furnished.

80AC. Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of

> *April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE, no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.*

16. Thus, it can be seen that to be eligible to make claim u/s 80IA of the Act or any other section of the Chapter VI A, the assessee should have filed the return of income under sub-section (1) of section 139 of the Act. The contention of the assessee is that the requirement is that the assessee should have filed the return u/s 139(1) of the Act, but need not have made the claim u/s 80IA in such return filed u/s 139(1) of the Act. It was submitted that the assessee has filed the returns of income for all the A.Ys under consideration within the time allowed u/s 139(1) and therefore, the condition mentioned in section 80AC is satisfied by the assessee and therefore, the assessee would be eligible for deduction u/s 80IA of the Act whether or not such claim was made in the original return of income. Sub-section 5 of section 80IA also provides that where the assessee fails to make a claim in the return of income for any deduction u/s 10A or 10AA or 10B or 10BBA or under any provision in Chapter VI A under the heading "C - deduction in respect of certain incomes", no deduction shall be allowed to him thereunder. To this provision also, the assessee has submitted that this is not applicable to the assessee because the assessee has made the claim in the return of income filed on 6.2.2014. Thus, according to the assessee, as long as the assessee has filed the return u/s

139(4) and subsequently has filed the revised returns making the claim in response to the notice u/s 153A of the Act, the assessee's claim is maintainable. Let us, therefore, consider the case law relied upon by the assessee and the applicability thereof to the facts of the case before us.

17. In the case of ACIT vs.P. Madhusudan Reddy (Supra), the Tribunal at Paras 8.4 and 14 of its order has held as under:

> *" 8.4. With reference to the contentions of assessee that the returns filed in response to Section 153A are invalid, it was submitted that the return of income filed in response to notice issued u/s. 153A subsequent to time limit provided therein cannot be considered as invalid return of income as there is no statutory requirement as in the case of return required to be filed u/s. 139(1). In respect of return to be filed u/s. 153A, the AO has power to extend the date of filing the return or the return filed beyond the time limit provided in the notice shall be considered for the purpose of completing assessment, if it is filed before the due date prescribed for completion of assessment u/s. 153A. However, such return filed beyond the time limit provided in notice u/s.153A or extended by the AO or in case there is no specific extension granted also, the return, if any, filed by the assessee before the completion of the proceedings shall be considered as valid return of income. On the other hand, the assessee has to face the consequences for not filing the return of income within the time limit provided in the notice u/s. 153A or beyond the time extended by the AO in terms of-*
>
> *a. interest u/s. 234A(3) subsequent to completion of assessment from the date of expiry of time provided u/s. 153A till the date of filing the return of income or in case no return of income is filed, up to the date of completion of the assessment;*
> *b. the assessee is liable to penal provisions u/s. 271F; and*
>
> *c. assessee may be tried for prosecution u/s. 276CC.*

In all the above three provisions, it is clearly stated that in the event of non-filing the return of income within the time provided in notice issued u/s. 153A, the assessee is liable for interest, penalty and prosecution accordingly. In view of this, it is quite clear that the assessee was allowed to file return of income, even beyond the time provided in the notice and such return is valid return of income for all the purposes under the Income Tax Act, including completion of the assessment, but with consequences of payment of interest, penalty and facing prosecution proceedings. In view of this, the assessee's contention that the returns of income filed by him beyond the time limit provided u/s. 153A is invalid, is not correct as per law.

10.1. Coming to the issue that assessee has not paid admitted taxes, it was submitted that the assessments u/s. 153A were based on invalid returns of income, hence the same was ab initio-void. It was submitted that assessee has not filed returns of income in response to notice u/s. 153A. Assessee received notices u/s. 276CC on 12-03-2009 to file the returns of income otherwise non-filing will lead to prosecution. Assessee filed returns on 18-08-2009 therefore, these returns which are filed in a hurry, were beyond the time limit given in the notices given u/s. 153A and are accordingly invalid returns of income. It was submitted that for AY. 2006-07, assessee filed originally return of income u/s. 139(1) on 31-10-2006 admitting income of Rs. 4,89,088/- and the taxes have been paid, the same computation was reiterated in the revised computation filed. For AY. 2007-08, assessee filed computation of income declaring loss of Rs. 3,35,01,000/- and no tax could be payable. For AY. 2008-09, assessee has revised the computation to NIL but paid the tax of Rs. 10,04,650/- which was claimed as 'refund'. It was the contention that since the returns were filed beyond the time limit given, the returns are to be considered as invalid returns. Therefore, subsequent proceedings are null and void ab-initio. Consequently, the provisions of Section 249(4) do not apply.

10.2. It was also contended that even though revised computations were filed along with retraction letter in the course of assessment proceedings, the AO has neither discussed about the retraction nor considered the revised computation and the orders are totally silent on that. Therefore, AO computed wrongly from the income of so called invalid returns. It was submitted that if assessee's revised computation of income is taken up, then, there would be no demand of taxes.

Thus, the appeals entertained by the CIT(A) are to be considered as valid. It was further submitted that Ld.CIT(A) has taken all steps by sending the documents filed before him for the comments of the AO, not only regarding computation of income and self-assessment tax but also other additions made. The AO indirectly accepted that the computation of income to be correct and no self-assessment tax would arise. It was submitted that Ld.CIT(A) also accepted the computation of income as there was no incriminating material and even though he has not mentioned very clearly that Section 249(4) is not attracted, the fact that he has disposed-off the appeals on merits do indicate that he has considered the revised computation and has taken into account the fact that no taxes are payable on that computations. It was further submitted that Ld.CIT(A) has not directed the AO to make the assessments on the basis of the revised computations. Therefore, assessee is in appeal. Ld. Counsel relied on various judicial proceedings that incomes which were wrongly included should not have been brought to tax and the various judicial precedents relied on is as under:

i. *Shri C. Radhakrishna Kumar Vs. Asst. Commissioner of Income Tax 16(1), Hyderabad [295 Hyd 2012]. Where in it was held that wrongful inclusion of an amount in the income tax return for the purpose of taxability, by itself will not make the assessee liable for tax. Article 265 of the Constitution provides that no taxes can be collected or levied without the authority of law. The Assessing Officer is required to compute the assessed income in accordance with law in terms of the provisions of the Income Tax Ac, 1961. Any wrongful offering of any amount towards income by the assessee will not operate as estoppel against the proper application of law.*

ii. *Bombay High Court in the case of CIT Vs. Prithvi Brokers & Shareholders Pvt. Ltd., [349 ITR 336] – the court held that the orders of the CIT(A) and the Tribunal clearly indicate that both the appellate authorities had exercised their jurisdiction to consider the additional claims as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in National Thermal Power Corporation Limited. This is clear from the fact that these judgments have been expressly referred to in detail by the CIT(A) and by the Tribunal.*

iii. *M/s. Vivera IT Applications Consulting (P) Ltd., Vs. Income Tax Officer, Ward-3(2), Hydreabad;*

129/Hyd/2014 – the Hon'ble jurisdictional ITAT held that only issue arising for consideration before us in the present appeal is whether CIT(A) was justified in not entertaining assessee's additional ground claiming exemption u/s. 10A. As can be seen, CIT(A) has dismissed assessee's additional ground only for the reason that the claim of deduction u/s. 10A was not raised by assessee by filing a revised return relying upon a decision of Goetz India Ltd., and Hindustan Housing Development Corpn (supra). However, we find force in the contention of learned AR that ratio laid down in the aforesaid two decisions are restricted to the proceedings before the AO and will not apply to the appellate authorities.

iv. Mumbai ITAT in the case of Lok Housing & Construction Limited [27 taxmann.com 15] – it was held that wrong statement which was corrected by the assessee by filing the revised return and the AO as well as the learned CIT(Appeals), in our opinion, was not justified in bringing to tax such hypothetical income in the hands of the assessee company on the basis of original return of income ignoring the revised return filed by the assessee. We, therefore, decide this issue in favour of the assessee on merit and delete the addition made by the AO and confirmed by the learned CIT(A) on this issue.
10.2……
……10.3……
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14.. At the same time, it is also to be noted that the tax has to be collected in accordance with law and any legal claim which is not properly made by inadvertence or ignorance should not be denied merely because assessee did not make a claim in the return of income. The Income Tax Act is meant for collection of correct tax and it cannot be treated as a lis between two parties but a tax adjustment as explained by the Hon'ble Madras High Court in the case of CIT Vs. Indian Express (Madurai) Pvt. Ltd., [140 ITR 705] at page No. 724. At any rate, appellate authority is entitled to admit any additional claim. However, the CIT(A) failed to consider assessee's contentions with reference to revised computation and as there is no direction regarding that to the AO, assessee in his appeals raised the contentions before us that the revised computations have not been considered. More over there is no finding

whether assessee is an investor or doing it as business. As seen from the statement recorded by DDIT, the fact that capital gains was computed indicate that assessee is treated as investor. In that case, the loss in business does not arise. Only capital loss on transfer of property should be quantified so as to set off or carried forward as per the provisions of the Act. Further DDIT quantified the total investment at Rs. 20,25,33,000 as on the date of search. This includes advances, sale proceeds, borrowals, some deficit cash etc., as per assessee. These require examination as some transaction may yield profit or gain, as the case may be, which require quantification year wise. These aspects have not been examined and require further verification".

18. In the case of M/s. KNR Constructions vs. DCIT (Supra) to which one of us (i.e.JM is the signatory) under similar circumstances, the Tribunal has held as under:

3. We have heard the arguments of both the sides and also perused the relevant material on record. At the time of hearing before us, the learned representatives of both the sides, besides strongly relying on the relevant portions of the orders of the authorities below which are in their favour, have also cited various case laws in support of their respective stand on the issue relating to the assessee's claim for deduction under section 80IA. We have carefully gone through and deliberated upon the judicial pronouncements cited by the ld representatives of both the sides.

3.1. As regards the preliminary issue as to whether the assessee is entitled to make a new claim for deduction under section 80IA in the returns of income filed in response to notices issued under section 153A as involved in six out of seven years under consideration i.e., A.Ys. 2006-07 to 2011-12, the Ld. Counsel for the assessee has relied on the decision of the Mumbai Bench of this Tribunal in the case of DCIT vs. Eversmile Construction Co. P. Ltd., (supra), wherein while dealing with a similar issue, the main features of the relevant provisions were noticed by the Tribunal and after analysing the same, it was held by the

Tribunal that any deduction claimed by the assessee in the proceedings under section 153A could not be rejected simply on the ground that it was not claimed in the original assessment. The relevant observations recorded by the Tribunal as contained in paragraph Nos. 6 to 9 of its order are extracted below :

"6. From the prescription of the above section the following features are noticeable in so far as we are concerned with the instant appeal :-

_ Assessment pursuant to search is to be made notwithstanding anything contained inter alia in section 147 ;

- Clause (a) of sub-section (1) provides that the relevant provisions shall apply as if the return filed in response to notice u/s 153A(1) is a return required to be furnished under section 139 ;

- First proviso to sub-section (1) states that the Assessing Officer is required to assess or reassess "total income" in respect of each assessment falling within the relevant six assessment years.

- The second proviso to sub-section (1) provides that the assessment or reassessment, if any, relating to any of the six assessment years pending on the date of search u/s 132 or making requisition u/s 132A, shall abate .

- Sub-section (2) of Section l53A provides that if due to one reason or the other the assessment made u/s l53A is annulled in any appeal or any other proceedings then the assessment or reassessment which had abated in second proviso to subsection (1) shall stand revived with effect from the date of receipt of the order of such annulment.

7. A close look at the above provision manifests that the Assessing Officer is required to make assessment afresh and compute the 'total income' in respect of each of the relevant six assessment years. As there is no specific inhibition On the jurisdiction of the Assessing Officer in not including any new income to such fresh total income pursuant to search which was not added during the original assessment, in the like manner, there is no

restriction on the assessee to claim any deduction Which was not allowed in the original assessment. The requirement of section 153A is to compute the total income of each of such assessment years. Such determination of the total income has to be done afresh without any reference to what was done in the original assessment. Of course, the AO is entitled to make any addition in the fresh assessment, which he made in the original assessment, provided he is satisfied with the merits of the addition. But the mere fact that there was some addition in the original assessment, would not preclude the assessee from Contesting the addition in the subsequent proceedings. As it is going to be a fresh exercise of framing assessment or reassessment of the total income at the end of the AO, the assessee cannot be stopped from not even arguing about the merits of his case qua the addition which was made in the original assessment. Debarring the assessee from making a claim about the deductibility of any item, which was earlier disallowed, counters the very concept of fresh assessment of total income.

8. The reliance of the learned Departmental Representative on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Works Pvt. Ltd [(1992) 198 ITR 297 (SC)] is misconceived. The reason for the same is that in that case the Hon'ble Supreme Court was considering the provisions of section 147 and it was held that once an assessment is validly reopened it is not open to an assessee to seek a review of concluded items unconnected with the escapement of income. Here it is pertinent to note that the conditions for taking action u/s 147 vis- vis under section 153A are altogether different. Even though assessment u/s 147 is made read with section 143(3), but the initiation of assessment or reassessment u/s 147 originates from the belief of the AO, on the basis of some tangible material, that income chargeable to tax has escaped assessment. After forming such belief, the AO is called upon to record reasons for the reopening of the assessment before issuing mandatory notice u/s 148. If the foundation of reassessment, being the reasons about the escapement of some income do not exist, then it

is impermissible to go ahead with the assessment u/s 147. It is sine qua non that some escaped income must be brought to charge in order to make a fresh assessment u/s 147. On the contrary, the search action itself mandates on the Assessing Officer to pass orders u/s. 153A computing total income for all the relevant six assessment years, irrespective of the fact whether some concealed income has surfaced as a result of search or not. It is thus apparent that the ambit of assessment u/s 147 cannot be imported into the scope of section 153A.

9. It is further important to note that the provisions of assessment in the case of search u/s l53A etc. have been inserted by the Finance Act, 2003 with effect from 01.06.2003. These provisions are' successor of the special procedure for assessment of search cases under Chapter XIV -B starting with section 158B. Whereas Chapter XIV - B required the assessment of "undisclosed income" as a result of search, which has been defined in section 158B(b), section 153A dealing with assessment in case of search with effect from 01.06.2003 requires the Assessing Officer to determine "total income" and not "undisclosed income."

3.2. For the reasons given above, it was held by the Tribunal that the starting point of the assessment under section 153A is the amount of income declared in the return of income and when the A.O. has to compute the total income of the assessee on the basis of the return of income, there may not be any scope for arguing that the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier. In the said case before the Tribunal, reliance was placed by the learned D.R. in support of Revenue's stand on the decision of Hon'ble Supreme Court in the case of Sun Engineering (supra) as in the present case, but the same was found to be misconceived by the Tribunal for the reasons given in paragraph No.8 of its order which are already extracted above.

4. Besides the decision of Hon'ble Supreme Court in the case of Sun Engineering (supra), the A.O. has relied upon the decision of Hon'ble Rajasthan High

Court in the case of Jai Steel (India) vs. ACIT (supra) to hold that assessee is not entitled to claim deduction under section 80IA for the first time in the returns filed in response to notice issued under section 153A for the relevant six years i.e., A.Ys. 2006-07 to 2011-12. The Ld. CIT(A) has also relied on the said decision of Hon'ble Rajasthan High Court to uphold the decision of the A.O. on this issue in so far as the A.Ys. 2006-07 to 2008-09 are concerned where the original assessments under section 143(3) had already been completed prior to the date of search. After going through the Judgment of Hon'ble Rajasthan High Court in the case of Jai Steel (India) vs. ACIT (supra), we find that the facts involved therein were materially different from the facts involved in the present case as rightly pointed out by the Ld. Counsel for the assessee. First of all, the claim made by the assessee in the said case in the return filed in response to the notice undersection 153A for the first time was that the Sales Tax incentive received by it was a capital receipt and the same being a subject matter of claim and not a regular allowable deduction as per the provisions of the Act, it was considered that the same required the initiation of claim and conclusion on the basis of facts and other judicial pronouncements. Moreover, no incriminating material was found in the said case before the Hon'ble Rajasthan High Court during the course of search and in the absence of such incriminating material, it was held by their Lordships that the assessment or re-assessment under section 153A would not result in any addition and the assessment passed earlier may have to be reiterated. In this regard, Hon'ble Rajasthan High Court referred to the decision of Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar Bhatia (2013) 352 ITR 493 (Del.) wherein it was held that where an assessment order has already been passed either under section 143(1)(a) or 143(3), the A.O. is empowered to reopen those proceedings and re- assess the total income taking note of the undisclosed income, if any, un-earthed during the search. While highlighting these observations of the Hon'ble Delhi High Court in the case of Anil Kumar Bhatia (supra), Hon'ble Rajasthan High Court however, appears to have not

taken cognizance of the further observations made by the Hon'ble Delhi High Court in the same paragraph No.20 that all the stops having been pulled out, the A.O. under section 153A has been entrusted with the duty of bringing to tax the total income of the assessee whose case is covered under section 153A, by even making re- assessments without any fetters, if need be.

4.1. Hon'ble Rajasthan High Court in the case of Jai Steel (India) vs. ACIT (supra) also did not accept the arguments of the assessee that the new claim can be made for the first time even in the return filed in response to notice under section 153A when the original assessment had already been completed by observing that if the same is taken to its logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the Ld. CIT(A), ITAT and the High Court, on a notice issued under section 153A of the Act, the A.O. would have power to un-do what has been concluded up to the High Court. It was held that any interpretation which leads to such conclusion has to be repelled and/or avoided. It is pertinent to note here that when any new claim is made by the assessee for deduction in response to the notice under section 153A which was not made in the original assessment proceedings as in the present case, the situation as contemplated by the Hon'ble Rajasthan High Court would not arise at all as there is no occasion in such case for the A.O. to un-do something which has been concluded up to the High Court as the assessee having not made any such claim during the course of original proceedings, there would not be any conclusion arrived at on the said issue even up to the High Court level arising from the original assessment proceedings. In our opinion, the decision of Hon'ble Rajasthan High Court in the case of Jai Steel (India) vs. ACIT (supra), thus is not applicable to the fact situation involved in the present case and the reliance of the Ld. CIT(A) thereon to hold that the assessee is not entitled to make a new claim for deduction under section 80IA for A.Ys. 2006-07 to 2008-09 wherein the assessments had been originally

completed under section 143(3) is clearly misplaced.

5. At the time of hearing before us, the learned CIT/DR has relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Murali Agro Products Ltd., (I.T. Appeal No.36 of 2009 dated 29.10.2010) and that of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (Income Tax Appeal No.707 of 2014 and others dated 28th August, 2015) in support of Revenue's case. It is, however, observed that the issue involved in both these cases was whether the A.O. was empowered to make additions to the total income of the assessee in the assessments completed under section 153Awithout there being any incriminating material found during the course of search and it was held in this context by the Hon'ble Bombay High Court as well as Hon'ble Delhi High Court that when the original assessments had already been completed prior to the date of search, the additions in the assessment under section 153A could be made only on the basis of materials gathered during the course of search. The issue involved in the case of CIT vs. Murali Agro Products Ltd., (supra) before Hon'ble Bombay High Court as well as CIT vs. Kabul Chawla (supra) before Hon'ble Delhi High Court thus was entirely different than the issue involved in the present case and the ratio of the said decisions cited by the learned D.R. is not applicable in the present case.

6. In the case of ACIT vs. VN Devodoss 157 TTJ 165 cited by the Ld. Counsel for the assessee, the Chennai Bench of this Tribunal had an occasion to decide ITA.No.946/H/2015 M/s. KNR Constructions Ltd., Hyderabad.

a similar issue as involved in the present case. In this context, reliance was placed by the Tribunal on the provisions of section 153A(1)(a) which provide that where a search is initiated under section 132, the A.O. shall issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years in the prescribed form and

verified in the prescribed manner and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139. It was held by the Tribunal that it is because of this provision of law stated in section 153A(1)(a) that a statutory presumption is made that a return filed under section 153Ais a return required to be filed under section 139(1) of the Act. The Tribunal also took note of the non- obstante clause contained in section 153A and held that said provision over-rides all other provisions stated in the Act in matters of filing of return of income consequent to a search and therefore, the return filed in pursuance of notice issued under section 153A is as good as a return filed under section 139(1). It was also held that where an assessee has filed its return of income as prescribed by law, even if as a consequence of search carried out under section 132 and in consequence of notice issued under section 153A, the assessee is obviously entitled for claiming corresponding deductions provided in law and the deduction claimed in return filed under section 153A cannot be denied on the ground that the claim was not made earlier. The Tribunal also relied on the decision of its Coordinate Bench in the case of DCIT vs. Eversmile Construction Co. P. Ltd., (supra) and held that the returns filed by the assessee under section 153A are to be treated as returns filed under section 139(1) by virtue of the law stated in section 153A(1)(a) and the assessees therefore, are entitled for deduction available under section 80IB(1).

7. It is thus that the decision of Mumbai Bench of this Tribunal in the case of Eversmile Construction Co. P. Ltd., (supra) as well as the Chennai Bench in the case of V.N. Devodoss (supra) is based on the relevant provisions of law including especially that of section 153A(1)(a). In the case of Hyderabad Chemicals Supplies Ltd., (ITA.No.352/Hyd/2005 dated 21.01.2011) it was held that when the decision of the Tribunal is based on the relevant provisions of law, the same is to be followed over the decision of the non-jurisdictional High Court that has been rendered without considering such statutory provisions that are directly relevant. We,

> *therefore, follow the decision of the Chennai Bench of this Tribunal in the case of ACIT vs. VN Devodoss 157 TTJ 165 (supra) as well as the decision of Mumbai Bench in the case of DCIT vs. Eversmile Construction Co. P. Ltd., (supra) to hold that the assessee is entitled to claim deduction under section 80IA in the returns filed in response to the notices issued under section 153A for the relevant six years i.e., A.Ys. 2006-07 to 2011-12 including A.Ys. 2009-10 to 2011-12 where the assessments had been originally completed under section 143(3) prior to the date of search. We accordingly, reverse the decision of the Ld. CIT(A) rendered on this issue for A.Ys. 2006-07 to 2008-09 and uphold the same for A.Ys. 2009-10 to 2011-12. The appeals of the assessee for A.Ys. 2006-07 to 2008-09 involving this solitary issue thus are allowed whereas, the relevant ground of the Revenue's appeal on this issue for A.Ys. 2009-10 to 2011-12 are dismissed.*

19. Further, the Hon'ble Kerala High Court in the case of Chirakkal Service Coop. Bank Ltd vs. CIT (Supra) at paras 18 to 21 has held as under:

> *18. Questions B and C relate to denial of exemption on ground referable to belated filing of return, that is to say, returns filed beyond the period stipulated under section 139(1) or section 139 (4), as the case may be, as well as section 142 (1) or section 148, as the case may be. There are no cases among these appeals where returns were not filed. There are cases where claims have been made along with the returns and the returns were filed within time. Still further, there are cases where returns were filed belatedly, that is to say, beyond the period stipulated under subsection 1 or 4 of section 139; and, there are also returns filed after the period with reference to sections 142(1) and 148 of the IT Act.*
>
> *19. Section 80A(5) provides that where the assessee any deduction, inter alia, under any provision of Chapter VIA under the heading C.-Deductions in respect of certain incomes , no deduction shall be allowed to him thereunder. Therefore, in cases where no returns have been filed for a particular assessment year, no deductions shall be allowed. This embargo in section 80A(5) would apply, though section 80P is not included in section 80AC. This is so because, the inhibition against allowing deduction*

is worded in quite similar terms in sections 80A(5) and 80AC, of which section 80A(5) is a provision inserted through the Finance Act 33/2009 with effect from 1.4.2013 after the insertion of section 80AC as per the Finance Act of 2006 with effect from 1.4.2006. This clearly evidences the legislative intendiment that the inhibition contained in subsection 5 of section 80A would operate by itself. In cases where returns have been filed, the question of exemptions or deductions referable to section 80P would definitely have to be considered and granted if eligible.

20. Here, questions would arise as to whether belated returns filed beyond the period stipulated under section 139(1) or section 139(4) as well as following sections 142(1) and 148 proceedings could be considered for exemption. If those returns are eligible to be accepted in terms of law, going by the provisions of the statute and the governing binding precedents, it goes without saying that the claim for exemption will also stand effectuated as a claim duly made as part of the returns so filed, for due consideration.

21. When a notice under section 142(1) is issued, the person may furnish the return and while doing so, could also make claim for deduction referable to section 80P. Not much different is the situation when pre-assessment enquiry is carried forward by issuance of notice under section 142 (1) or when notice is issued on the premise of escaped assessment referable to section 148 of the IT Act. This position notwithstanding, when an assessment is subjected to first appeal or further appeals under the IT Act or all questions germane for concluding the assessment would be relevant and claims which may result in modification of the returns already filed could also be entertained, particularly when it relates to claims for exemptions. This is so because the finality of assessment would not be achieved in all such cases, until the termination of all such appellate remedies. Under such circumstances, the Tribunal was not justified in denying exemption under section 80P of the IT Act on the mere ground of belated filing of return by the assessee concerned. A return filed by the assessee beyond the period stipulated under section 139(1) or 139(4) or under section 142(1) or section 148 can also be accepted and acted upon provided further proceedings in relation to such assessments are pending in the statutory hierarchy of adjudication in terms of the provisions of the IT Act. In all such situations, it cannot be treated that a return filed at any stage of such proceedings could be treated as non est in law and invalid for the

purpose of deciding exemption under section 80P of the IT Act. We thus answer substantial questions of law B and C formulated and enumerated above."

20. ITAT Ahmedabad Bench in the case of Parmeshwar Cold Storage (P) Ltd vs. ACIT has held that, for claiming deduction u/s 80IB, only condition is that the original return should be filed in time.

21. In the case of CIT vs. Mahalakshmi Rice Factory (2007) 294 ITR 631 (P&H), the Hon'ble Punjab & Haryana High Court has held that to claim deduction u/s 80IA, it would be sufficient if the audit report is filed during the course of or before completion of the assessment proceedings.

22. We find that these decisions were followed by the CIT (A) to consider the assessee's claim of deduction u/s 80IA of the Act in the revised return filed in response to notice u/s 153A of the Act and that such a claim can be entertained. The second ground on which the deduction was disallowed by the AO was that the assessee is only a contractor and not a developer of the infrastructure. The CIT (A), at Para 13.2 of his order, held that the AO has disallowed the claim u/s 80IA only on the ground that the belated return of the assessee cannot be considered and that the contract agreements specific to each of the project claimed to be eligible, have not been examined by the AO. At Para 13.2 of his order, the CIT (A) has brought out the project-wise details of net profit transferred to the income computation which is claimed as a deduction u/s 80IA in the form of a table. Thereafter, he has directed the AO to evaluate the credentials of the contractor

as a developer with reference to the specific facts of each contract where such claim is made and also directed the assessee to provide all the necessary details to the AO. The CIT (A) also observed that section 80IA(4)(i)(b) requires that the development of infrastructure facility should be pursuant to an agreement entered into by the assessee with the Central Govt./State Govt./local authority/any other statutory bodies. After verifying the information furnished in the table, the CIT (A) observed that some of these agreements are prima facie, not with the Govt. or any other such authority but are with private parties such as Ratna Infrastructure Projects Pvt Ltd or IVRCL-SSIL JV etc., and therefore, the claim with regard to such contracts is not allowable. AO was accordingly directed to make appropriate quantification. We find that the CIT (A) has brought out the facts properly and the learned DR was not able to rebut any of these findings of the learned CIT (A) without any audience to the contrary. Therefore, we do not see any reason to interfere with the order of the CIT (A) on this issue. Revenue's appeals are accordingly dismissed.

The other appeals filed by Sub Contractors and Revenue against the order of CIT(A)-11are:

ITA No. 1359 to 1362/H17 in the case of M. Krishna Reddy, 1351 to 1354/H/17 in the case of Sushi Udyog, 1368 & 1369/H/17 in the case of S. Janardan Reddy and 1363 to 1365/H/17 in the case of A. Chandra Kanth and ITA Nos. 1366 & 1367/H/17 in the case of Prasad Reddy & Co. – All the said appeals are filed by revenue.

ITA Nos. 1390 to 1393/H/17 in the case of M. Krishna Reddy, ITA Nos. 1408 to 1411/H/17 in the case of B. Narsimha Reddy, ITA Nos. 1399 to 1402/H/17 in the case of Sushi Udyog Constructions

Co., ITA Nos. 1405 & 1406/H/17 in the case of S. Janardhan Reddy, and 1397 & 1398/H/17 in the case of Prasad Reddy & Co. and 1394 to 1396/H/17 in the case of A. Chandrakanth - All these appeals are filed by assessees.

23. The only issue of addition in all the AYs 2008-09 to 2011-12 is estimation of income on protective basis @ 12.5% on the alleged sub-contract receipts by the AO. Against the above, the revenue is in appeal objecting for the deletion of estimation and CIT(A) should have treated the addition as commission even if it is not treated the revenue from Sub Contract. Similarly, Assessees (Sub contractors) in appeal pressing that their revenue is out of sub contract business only and the income declared by them should be accepted as income from sub contract business.

23.1 In the case of M/s Prasad Reddy & Co, the assessee has filed its original return of income on 28.10.2007, and subsequently, the assessment was also completed u/s 143(3) on 26.11.2009 and accepted the return of income filed by the assessee. Only after search proceedings in the case of ASR Engineering and Projects Limited, the assessment was made u/s 143(3) r.w.s 153C by making estimation @ 12.5 of sub contract revenue. While other sub contractors, there was no scrutiny assessment u/s 143(3).

24. Aggrieved, the assessee's preferred appeals before the CIT(A) and submitted that the AO estimated the income at 12.5% of the gross receipts. It was submitted that the AO impliedly accepted that 87.5% of the receipt was spent by the assessee and, therefore, the AO was not justified in holding that there is no sub-contract work undertaken by the assessee. Further, it was submitted that the AO was not justified in estimating the income at 12.5% of the gross contract receipts, as the ITAT, in a number of cases held that the income from sub-contract activities would be 5%.

24.1 As regards applicability of proceedings u/s 153C of the Act, the assessee submitted as under:

> *"The assessee humbly submits that no information was found during the course of search and seizure operations. Therefore, the proceedings initiated u/s 153C of the IT. Act are not valid The said proceedings can be initiated only if some information is found during search and seizure operations of other person. In the case of the assessee no such information was found during search operations in the case of Sai Sudhir Infrastructures Ltd According to the provisions of Sec. 153C as they existed at the relevant point of time, the said*

section enabled the Assessing Officer to issue a notice as contemplated in Sec.153A when the books of account or documents or assets belonging to the assessee were found during the course of search and seizure operations of any other person. It is clear from the provisions of Sec. 153C that the Assessing Officer can issue a notice u/s 153C when he finds some material during the course of search and seizure operations in any other case. The Assessing Officer in the assessment order is referring to search and seizure operations in the case of Sai Sudhir Infrastructures Ltd The Assessing Officer simply mentioned that notice u/s 153C was issued consequent to search and seizure operations in the case of Sai Sudhir Infrastructures Ltd There is no mention as to how the Assessing Officer got jurisdiction for issue of notice u/s 153C of the IT. Act As can be seen from the provisions of the said section that there should have been some material relating to the assessee at the preMIses of Sai Sudhir Infrastructures Ltd No such information was found or no such information was referred to in the assessment order. Therefore, the assessee submits that the Assessing Officer has no jurisdiction to issue a notice u/s 153C of the I T. Act The Ahmedabad Bench of the ITAT in the case of A CIT Vs Gamhhir Silk Mills reported in 61 ITR (Trib.) 376 held that where no material was found during the course of search and seizure operations, the AO could not assume jurisdiction for framing the assessment u/s 153C of the Actg. It was, therefore, submitted that the initiation of proceedings u/s 153C of the Act is not valid."

25. The CIT(A), after considering the submissions of the assessee, observed that the assessee claims to be a sub-contractor for M/s Sai Sudheer Infrastructure Ltd. He noted that in the case of MIs Saisudhir Infrastructures Ltd., while adjudicating the grounds relating to non-genuine expenditure claimed by the company, it was held in a common order dated 30/03/2017 for AYs 2006-07 to 2012-13, that the expenditure claimed in the name of various persons/entities was liable to be seen as bogus having regard to the evidence recovered in the search and the probabilities of the case. He, therefore, observed that the assessees are such identified persons/entities payments to whom were disallowed in the hands of M/s Saisudheer Infrastructures Ltd. Being so, an independent assessment of these persons/entities in respect of alleged contract work and related payments allegedly received would have no legs to stand on. He, therefore, directed the AO to delete the income brought to tax protectively in the hands of the assessee.

26. Aggrieved, the revenue as well as assessee are in appeal before us raising similar grounds as discussed in para12 above.

27. Ld. DR relied on the grounds of appeal and submitted that even though ld. CIT(A) found that it is protective assessment, but still, the sub-contractors must have earned income either as profit from the business or as commission.

28. Ld. AR relied on the written submissions.

29. Considered the rival submissions and perused the material on record. As per our discussion in Para 11 above and conclusions drawn therein, we held that Ld. CIT(A) has confirmed the addition based on human probabilities and presumptions and not relying on any material on record. The revenue declared by sub contractors is to be treated as income from business and the income from main contract, in this line of business, the Hyderabad benches have treated 8% as normal, for sub contract business, it was at 5%. Respectfully following the same, we direct the AO to estimate the income of sub-contractors @ 5% and any sub-contractors, who had declared the income in excess of 5% the same may be treated as income from this business. Accordingly, In all the appeals, grounds raised by assessees are partly allowed and grounds raised by revenue are dismissed.

Penalty orders:

ITA Nos. 1316 to 1319/H/16 in the case of Sushi Udyog Construction Co. and ITA Nos. 1320 & 1321/H/17 in the case of A. Chandrakanth.

30. Brief facts, as taken from ITA No. 1316/Hyd/2016 for AY 2008-09 are, a search and seizure operation was carried out in the case of M/s Sai Sudhir Infrastructures Limited group on 30-11-2011. In the course of search /post-search operation proceedings, certain documents relating to the transactions that took place between the assessee and M/s Sai Sudhir Infrastructures Limited were found and seized. Subsequently, notice u/s 153C was issued to the assessee to file the Returns of Income. But the assessee did not file the Returns of Income. Hence, the Assessing Officer has issued a show cause notice to the assessee proposing to complete the assessments estimating income @ 12.5% on the works apparently executed each year. The Assessing Officer noticed that the turnover of the assessee exceeded the specified limit of Rs.40 lakhs (AY 2008-09: Rs.9,81,23,862/-; AY 2009-10 : Rs.7,06,14,926/-; AY 2010-11: Rs.12,71,23,160/-). In AY 2011-12 also the specified limit of Rs.60 lakhs

was exceeded as a result of the turnover of Rs. 11,22,38,997/- noticed. As per the provisions of section 44AB of the Act, the assessee is statutorily required to get his accounts audited by a duly qualified accountant for these years. The Assessing Officer completed the assessment by estimating the income on a protective basis @ 12.5% for the assessment years under consideration. A show cause notice was also issued to the assessee as to why penalty should not be levied u/s 271B of the Act for its failure to comply with the provisions of section 44AB of the I.T. Act. Since the assessee has not responded to the said notice, the Assessing Officer levied a penalty of Rs.1,00,000/- each for Asst. Years 2008-09 to 2010-11 and Rs.1,50,000/- for A.Y. 2011-12.

31. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and filed written submissions, which are as under:

> *" For the Assessment year 2008-09- the assessee received contract receipts of Rs.9,92,48,346 and arrived at a profit of Rs.36,61,230/-. The books of account are properly maintained and the books were audited by the Chartered Account The audit report as required u/s: 44AB was obtained on 25.09.2008. There was a delay in filing the return of income and the assessee filed the return of income on 15.09.2011 enclosing the Audit Report After the said return of income was filed, the Income Tax Authorities conducted search and seizure operations at the premises of Sai Sudhir Infrastructure Pvt Ltd 30.11.2011 and the Assessing Officer initiated proceedings u/s. 153C of the I.T. Act The Assessing Officer completed the assessment u/s 144 r.w.s.153C on 12.03.2014. In the said assessment order, the Assessing Officer did not mention that proceedings u/s 271B were being initiated However, the Assessing Officer by his order dated 12.03.2014 levied a penalty of Rs; 1,00,000/- holding that there was failure to respond to the provisions of Sec 44AB of the I.T. Act. The Assessing Officer in the said order mentioned that there was a requirement for the assessee to get the books of account audited under the provisions of Sec. 44AB and that the assessee did not respond to the notice issued and, therefore, penalty under the said section is leviable.*
>
> *In this regard, it is humbly submitted that the Assessing Officer is not correct in mentioning that the assessee did not get the books of account audited In fact, the books of account were audited by a qualified Chartered Accountant on 25.09.2008 and such certificate along with the audit report was filed before the Assessing Officer along with the return of income filed Therefore, there is no failure of not filing the audit report before the Assessing Officer. However, there is delay in filing the return of income and, therefore, the assessee was under the bonafide impression that the return of income need not be filed u/s. 139(1) of the I. T. Act. The Assessing Officer issued notice u/s. 153C of the IT Act and by then the return of income along with the audit report was available before the*

Assessing Officer. It is submitted that once notice u/s. 153C was issued, the earlier proceeding got abetted and no penalty proceedings can be initiated for the delay in filing the audit report along with the return of income. However, such audit report was available with the Assessing Officer at the time of initiation of proceedings u/s. 153C and, therefore, the Assessing Officer cannot hold that audit report was not available with him at the time of compliance of assessment proceedings."

31.1 Further, it was submitted that the assessee had audited its accounts vide certificates in Form 3CB and Form 3CD dated 25-09-2008 (AY 2008-09), 25-09-2009 (AY 2009-10) and 20-09-2010 (AY 2010-11). It was further submitted that these tax audit reports were furnished before the Assessing Officer in returns of income filed on 15/09/2011 for AY 2008-09 and AY 2009-10, and on 30/06/2011 for AY 2010-11. Copies of Return of Income along with audit report were also furnished by the assessee for the assessment years under consideration.

31.2 In AY 2011-12, the ld. AR submitted that the assessee was unable to comply with the provisions of section 44AB since proper books of account could not be maintained, and relied upon a decision of the Kochi Bench of the ITA in the case of K.V. Ramachandran Vs. DCIT, 58 SOT 264.

22. After considering the submissions of the assessee, the CIT(A) confirmed the penalty levied by the AO u/s 271B by observing as under:

"7. I have gone through the facts of the case and submissions of the assessee. On careful consideration for A.Yrs. 2008-09, 2009-10 & 2010-11, it is seen that in the circumstances of the case, characterized by non-compliance with the notices issued, the Assessing Officer had to necessarily assume that the required Tax Audit was not carried out. It is the stand of the Ld. AR that the Assessing Officer might not have had any earlier occasion to notice the Tax Audit report, but now that such a report dt 25.09.2008, 25.09.2009 and 20.09.2010 respectively have been brought on record, it has to be held that the audit was indeed carried out by the prescribed date, because of which the impugned penalty has to be deleted. In other words, the Assessing Officer might have had a valid reason for the erroneous assumption based on which the penalty had been levied. The fact however, is that in the light of the documents (respective Tax Audit Reports) now submitted, and in the absence of anything to show that the report was ante-dated, it has to necessarily be held that the assessee's accounts were audited by the prescribed date. However, a plain reading of section 44AB makes it abundantly clear that the section imposes two requirements simultaneously. The Tax Audit should not only be carried out by the prescribed date, such Report should have also been furnished to the Assessing Officer by the prescribed date. It is an admitted fact in this case that the Report was filed only on 15.09.2011 for A.Yrs. 2008-09 & 2009-10 and

30.06.2011 for A.Y.2010-11. as an enclosure appended to documents purporting to the returns of income. These documents are not only within the date prescribed u/s 139(1), they are beyond the time frame referred to uls 139(4). These documents do not even have the status of a return of income. In view of this factual position, the requirements of section 44AB cannot be seen as being fully complied with. It is also not the case of the assessee that though belated, the Assessing Officer had the benefit of perusing the report in question, and therefore, the delay is a mere technicality. The provisions of section HAB do not envisage part compliance. On facts, therefore, It has to be held that even if the purported tax audit did take place by the prescribed date, it cannot be seen as having been furnished before the Assessing officer by the prescribed date, as required for the purposes of section 44AB. Being so, the penalty provisions under 271B are validly invoked, and the order of penalty dated 12.03.2014 does not call for any interference.

7.1 In A.Y.2011-12 it is stated that no proper books of account were maintained because of which it was not possible to get a tax audit conducted. In the decision reported at 58 SOT 264 relied upon by the Assessee, books of account were never maintained by the assessee because of which it was not possible to insist upon an audit of such books. In this connection, it is noticed that it has been the consistent stand of the assessee in all the preceding Assessment Years that regular business operations were performed and proper books of account were maintained. There is no explanation as to the circumstances under which the assessee chose to abruptly stop maintaining books of account with effect from F.Y .2010-11. This claim not only defies probability, but has also never been made before Assessing Officer. It is pertinent to note that for reasons best known to the assessee opportunities for bearing extended by the Assessing Officer several times during assessment as well as penalty proceedings were never availed, leading to ex-parte decisions. It is not the case of the assessee that business operations ceased during the year of account. The assessee, however, claims that he merely ceased to maintain books of account. This new claim introduced for the first time in appellate proceedings after substantial efflux of time, is neither credible nor probable. Seen in this light of the matter the non-compliance with provisions of section 44AB is not satisfactorily explained, as a result of which the order of penalty dated 12/03/2014 for AY 2011-12 does not call for any interference.

7.2 It is also stated in the written submission that the Assessing Officer did not record initiation of penalty proceedings u/s.271B in the assessment order. It was further submitted that penalty proceedings could not have been initiated because earlier proceedings abate once a notice under section 153C is issued. These objections do not hold water because penalty proceedings u/s.2718 are independent of assessment proceedings and there is no requirement that they should necessarily have been initiated in the course of assessment proceedings. With regard to abatement of proceedings upon issuance of notice u/s. 153C the second proviso to section 153A makes it clear that what abates are only assessment or reassessment proceedings that are pending on the date of initiation

of Search. The objection raised has no relevance to the issue on hand."

33. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal:

"1) The order of the learned CIT (A) is erroneous both on facts and in law.

2) The learned CIT (A) erred in confirming the penalty u/s 271B of Rs.1,00,000/- levied by the Assessing Officer.

3) The learned CIT(A) ought to have considered the fact that the assessee filed the audit report along with the return of income filed on 15.9.2011 and the same was available with the department.

4) The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that by the time the notice u/s 153C was issued by the Assessing officer, the audit report for the year under consideration was available with the department.

5) The learned Commissioner of Income-Tax (Appeals) ought to have considered the fact that there is no such default of non filing of audit report while completing the assessment u/s 144 r.w.s. 153C of the I.T. Act and that the penalty proceedings were initiated during the assessment proceedings u/s 153C of the I.T. Act.

6) Any other ground that may be urged at the time of hearing."

34. Considered the rival submissions and perused the material on record. We notice that the assessee filed the return of income belatedly but before the search proceedings for the assessment years under consideration AY 2008-09, AY 2009-10 and AY 2010-11. The assessee made available the relevant audit report at the time of assessment, this is clearly evident from the fact that the audit had taken place before the date of filing return of income and the same was within the provisions of sec 44AB.

34.1 With regard to AY 2011-12, the assessee has not completed the books and proper books are not maintained even though the turnover crossed the prescribed limit requiring the assessee to get its accounts audited. Since, it is clear violation of section 44AB, we are inclined to sustain the addition made by the AO. Accordingly, the appeals filed by the

assessee for the AY 2008-09, 2009-10 and 2010-11 are allowed and for AY 2011-12 is dismissed.

34.2 Since similar appeals were filed by A. Chandrakanth Reddy also for AY 2009-10 and 2010-11, the same are allowed considering the above conclusion.

35. In the result,

a) ITA Nos. 1132 to 1136/Hyd/2017 of the assessee are partly allowed.

b) ITA Nos. 1382 to 1385/H/17 and ITA Nos. 222 to 226/Hyd/2019 of the revenue are dismissed.

c) ITA No. 1360 to 1362/H17 & 1359/Hyd/2017 in the case of M. Krishna Reddy, 1351 to 1354/H/17 in the case of Sushi Udyog, 1368 & 1369/H/17 in the case of S. Janardan Reddy and 1363 to 1365/H/17 in the case of A. Chandra Kanth and 1366 & 1367/H/17 in the case of Prasad Reddy & Company (All the said appeals are filed by revenue.) – Dismissed.

d) ITA Nos. 1391 to 1393/H/17 & 1390/H/17 in the case of M. Krishna Reddy, ITA Nos. 1408 to 1411/H/17 in the case of B. Narsimha Reddy, ITA Nos. 1399 to 1402/H/17 in the case of Sushi Udyog Constructions Co., ITA Nos. 1405 & 1406/H/17 in the case of s. Janardhan Reddy, ITA Nos. 1397 & 1398/H/17 in the case of Prasad Reddy & Co. and 1394 to 1396/H/17 in the case of A. Chandrakanth (All these appeals are filed by assessees). – Partly allowed.

e) All other appeals filed by revenue in sub-contracts – Dismissed.

f) ITA Nos. 1316, 1318 & 1319/H/16 in the case of Sushi Udyog Construction Co. and ITA Nos. 1320 & 1321/H/17 in the case of A. Chandrakanth are allowed. ITA No. 1317/Hyd/16 (AY 2011-12) is dismissed.

Pronounced in the open Court on 30th August, 2019.

Sd/-	**Sd/-**
(P. MADHAVI DEVI)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 30th August, 2019

kv

Copy to:-

1) ASR Engg. & Projects Ltd., 2, M. Krishna Reddy, 3) B. Narasimha Reddy, 4) Sushi Udyog Construction Co., 5) S. Janardhan Reddy, 6) Prasad Reddy & Company, 7) A. Chandrakanth, C/o Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Elegance, 3-6-643, Street No. 9, Himayatnagar, Hyderabad – 500 029.
8) DCIT, Central Circle – 1(3), Hyderabad
9) CIT(A) – 11 Hyderabad.
10) Pr. CIT(Central), Hyd.
11) The Departmental Representative, I.T.A.T., Hyderabad.
12) Guard File