

आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.109/Viz/2013
(निर्धारणवर्ष/Assessment Year : 2008-09)

Asst.Commissioner of
Income Tax
Circle-3(1)
Vijayawada

Vs. M/s Sri Bhaskar Contractors
Company
D.No.60-3-27, F.No.101
Sai Aniketh Apartment
ITI Bus Stop, Ashok Nagar
Vijayawada
[PAN : AAQFS5687P]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

Cross Objection No.70/Viz/2013
(Arising out of I.T.A. No.109/Viz/2013)

M/s Sri Bhaskar Contractors
Company
D.No.60-3-27, F.No.101
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Asst.Commissioner of
Income Tax
Circle-1(1)
Vijayawada

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

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**आयकर अपील सं./I.T.A.No.432/Viz/2017
(निर्धारण वर्ष/Assessment Year : 2012-13)**

Asst.Commissioner of Income Tax
Circle-3(1)
Vijayawada

Vs. M/s Sri Bhaskar Contractors
Company
D.No.60-3-27, F.No.101
Sai Aniketh Apartment
ITI Bus Stop, Ashok Nagar
Vijayawada
[PAN : AAQFS5687P]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से /Revenue by : Shri D.K.Sonowal, CIT DR
निर्धारिती की ओर से / Assessee by : Shri P.V.Subba Rao, AR

सुनवाई की तारीख / Date of Hearing : 20.08.2019
घोषणा की तारीख/Date of Pronouncement : 04.10.2019

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

These appeals are filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)], Vijayawada in Appeal No.339/CIT(A)/VJA/10-11 dated 07.12.2012 for the A.Y. 2008-09 and in I.T.A. No.90/CIT(A)/VJA /2015-16 dated 21.02.2017 for the A.Y.2012-13 and cross objections are filed by the assessee for the Assessment Year (A.Y.) 2008-09. For the sake of convenience, these appeals are clubbed, heard together and a common order is being passed as under.

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2. The assessee is engaged in the business of civil contract business. For the A.Y. 2008-09, the assessee filed the return of income declaring total income of Rs.1,32,59,750/-. The return was processed u/s 143(1) and taken up the case for scrutiny. Notice u/s 143(2) and 142(1) were issued to the assessee and the assessment was completed u/s 143(3) on total income of Rs.5,28,18,310/-. During the assessment proceedings, the Assessing Officer (AO) posted the case for hearing as many as 17 times apart from the first notice dated 31.08.2009. During the assessment proceedings, the assessee has not furnished the information as called for by the AO. The A.R. of the assessee, however, appeared from time to time and sought for adjournments or furnished the partial information. The assessee produced the ledger accounts and on verification the AO noticed huge difference between the figures mentioned in the Profit & Loss account ('P&L account' in short) and the amounts appearing in the ledger accounts in respect of chips, bitumen, oil and lubricants. The AO requested to produce the bills and vouchers in support of journal entries passed, to reconcile the differences between the books of accounts and the P&L account. The assessee did not produce the required evidences. The AO issued summons u/s 131 of the Act on 03.12.2010 with a direction to attend the office on 14.09.2010 and produce the bills and vouchers

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for expenses debited to P&L account for the year under consideration and also to produce the books of accounts i.e. Day book / cash book, bank book and ledger. The assessee sought adjournment. In the similar fashion, whenever the case was posted for hearing either the assessee seeking adjournments or furnishing the partial information. Therefore, the AO completed the assessment u/s 143(3) as per the information available on record and assessed the total income at Rs.5,28,18,310/-.

2.1. The first issue is with regard to the addition of Rs.1,00,85,000/- payment made to Progressive Constructions Ltd. (PCL). The AO found during the assessment proceedings that the assessee has debited an amount of Rs.1,00,85,000/- towards 'chips', 'oil and lubricants' by way of journal entry. The assessee explained that the assessee made the payments to M/s PCL for supply of material. The assessee was asked to file confirmation from M/s PCL and to produce evidence such as bills and invoices raised by them and vouchers for payments made. The assessee failed to furnish such confirmation. However, the AO noticed that the assessee paid amounts to M/s PCL by cheques and the cheques were cleared in Axis bank, Benz Circle Branch, Vijayawada. Hence, the AO called for information from M/s PCL on 03.12.2010

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seeking account copy of the assessee for the period from 01.04.2007 to 31.03.2008. In response to the AO's letter, M/s PCL had informed that there were no transactions between these two parties since 01.04.2007 and the same submission was confirmed by their letter dated 16.12.2010. The AO brought the said information to the notice of the Ld.AR and requested to substantiate its claim with proper evidence that the payment was for the purpose of business. In response, the assessee filed letter dated 23.12.2010 stating that they have purchased the chips and dust from PCL for which the payment was made by cheques. The assessee also stated to have given the details of vouchers, vehicle number, size of chips supplied by PCL for the month of June 2007, July 2007 and March 2008. The assessee further stated that there was no practice of giving pucca vouchers in this line of business. Since the PCL has not confirmed the supply of chips and dust, the AO disbelieved the payments made by the assessee to the extent of Rs.1,00,85,000/- for business purposes and accordingly made the addition u/s 37(1) of the Act holding that the expenditure was not genuine.

2.2. The second issue in dispute is the payment made to M/s Raghava & Co. During the assessment proceedings, the AO found that the assessee has made payments of Rs.38,02,376/- to M/s Raghava & Co., and the said amounts were

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transferred to 'earth work' and 'oil and lubricants' by passing journal entries. The assessee was asked to furnish the basic evidences for the entries made in the books of accounts as well as the reason for re-grouping the particular expenditure. The assessee failed to furnish any evidence to support its contentions. However, the assessee filed a letter stating that the payments were given for taking the chips and dust from them as the said material was in short supply and M/s Raghava & Co. stated to have supplied the material for execution of work without any hindrance. The AO found that the payments were stated to have made for supply of chips and dust which is contrary to the entries made in the books of accounts of the assessee firm. As per the accounts, the payments were for earth work and oils and lubricants against the claim made by the assessee in the letter for the supply of dust and chips. The AO recorded the statement from the managing partner on 20.12.2010 and while deposing the statement on oath, the managing partner stated that the payments made to Raghava and Co., were in the nature of payments made to contractors for executing the work. In response to question No.19, in the statement recorded on 20.10.2010 the assessee replied that sub contract was given to M/s Raghava & Co. Since the Managing Partner himself has stated that the payments were made for sub contract payment to M/s Raghava & Co., the

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assessee required to deduct the tax at source at the time of crediting the amounts to M/s Raghava & Co., Since the assessee failed to deduct the tax at source, the AO made the addition of Rs.38,02,376/- u/s 40(a)(ia) of the Act.

2.3. The third issue in this case is the disallowance of expenditure on account of 40A(3) of the Act. During the course of assessment proceedings, the AO obtained the bank account copies of ING Vysya Bank, Governorpet branch, in CC No.4613 along with copies of cheque leaves for examining the genuineness of the payments, since, the assessee failed to produce any evidence for various payments made by it. The AO found from bank account that whenever there was withdrawal, either the name of the party to whom the money was paid or the name and number of the account to which the money was transferred or the details of clearing inward / outward is mentioned. The cheque leaves specifically give the details of cash paid across the counter and the AO found that majority of the payments were made through bearer cheques and on many occasions, either the assessee has issued self cheques or bearer cheques in the name of third parties, but the same were encashed by the accountant of the assessee firm or the managing partner on certain occasions. The AO further found that the bearer cheques were encashed across the counter and made cash payments. The AO prepared the list of cheques encashed across the

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counter with the names of third parties in whose favour the cheque was issued with amount, purpose and compiled the list of payments as Annexure-1 enclosed to the assessment order. As per the list, the bearer cheques issued by the assessee firm in the name of the third parties and encashed by the parties across the counter without routing through any of the accounts. The assessee booked all the expenses towards various heads such as labour, chips, oil and lubricants. As the payments to the parties otherwise by cross cheque, exceeded the threshold limit prescribed u/s 40A(3) of the Act, the AO called for explanation from the assessee as to why the payments should not be added back u/s 40A(3) of the Act. The assessee filed explanation claiming exceptions under Rule 6DD of the I.T.Rules and requested not to make any addition u/s 40A(3). The AO carefully examined the explanation of the assessee and found that the assessee has made cash payments or the payments otherwise than by crossed cheques / bearer cheques. The payments exceeded threshold limit for making the payments otherwise than by crossed cheque. The Ld.AO further found that the assessee's case is not covered u/s 40A(3) of the Act for making the payments otherwise than by crossed cheque. The AO further found that though the assessee stated to have claimed the payments made for labour payments through mastries, the AO did not find merit in the submission of the

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assessee. Therefore, the AO held that the assessee has violated the provisions of section 40A(3) of the Act, thus the payments made are covered u/s 40A(3) of the Act and accordingly made addition of Rs.2,18,63,350/-. Thus, the AO completed the assessment on total income of Rs.5,28,18,310/- against the return of income of Rs.1,32,59,750/-.

3. Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) partly allowed the appeal of the assessee. The Ld.CIT(A) deleted the additions made by the AO in respect of payments made to PCL for Rs.1,00,85,000/-, the addition u/s 40a(ia) of the Act amounting to Rs.38,02,376/- and the addition made by the AO u/s 40A(3) of the Act amounting to Rs.2,18,63,350/-.

3.1. The Ld.CIT(A) held that with regard to payment of Rs.1,00,85,000/- the supplies were made by the PCL in the name of R.Pratap Reddy, managing partner of the assessee firm. The PCL has clarified the supply of material to the managing partner which was received by the AO subsequent to the completion of the assessment proceedings, hence viewed that there is no case for making addition, accordingly deleted the addition.

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3.2. With regard to the addition u/s 40(a)(ia) of the Act, relating to Raghava & Co., the Ld.CIT(A) was of the opinion that the assessee was under confusion when the statement u/s 131 was recorded and the statement was given in confusion. He stated that Raghava & Co., is a sub contractor and also the supplier of materials and the assessee had borrowed oils and lubricants on exigencies from M/s Raghava & Co., and the supplier was in the business of supply of oils and lubricants, hence, there is no case for invoking the provisions u/s 40(a)(ia) of the Act. Accordingly deleted the addition.

3.3. With regard to 40A(3) payment, the assessee submitted before the Ld.CIT(A) that the said practice of payment through bearer cheques or the cash payments was made in the earlier years also and the department did not object the same in the earlier years and accepted the submissions of the assessee and allowed the expenditure. The payment was for supply of material, providing labour force etc., instead of paying each labourer, there was a system of paying the amounts to the mastries. The Ld. CIT(A) further viewed that no fraudulent payments were detected by the AO and the bearer cheques were issued in advance to ensure regular supply of material. Since the assessee is executing the road laying works in rural and remote areas, the Ld.CIT(A) held that the AO is not justified in disallowing the impugned

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payments and accordingly directed the AO to delete the addition. For the sake of clarity and convenience, we extract relevant part of the order of the Ld.CIT(A) in para No.6A, 6B and 6D which reads as under :

“6A. The first issue is regarding payments made to M/s Progressive Constructions Ltd, involving Rs 1,00,85,000. It transpires from records that chips (kankar) are one of the items without which the appellant's work would not go ahead, for which regular suppliers were there But, however at times of need, the appellant gets the same from MIs Progressive Constructions Ltd, Hyderabad When called upon to explain by the AO, the appellant has furnished the facts to the AO. It is submitted by the AR that subsequent to furnishing the details, the AO on his own obtained the information from the company from whom the chips and bitumen was obtained by the appellant and as per the AO, the company has denied the supplies and proposed addition to the appellant The appellant on seeing the information obtained by the AC has observed that the supplies were made in the name of the Managing Partner of the appellant Shri Regalla Pratap Reddy, instead of the appellant Sri Bhaskara Construction Company. On realizing the mistake, the appellant has written to the supplier company MIs Progressive Construction Company and got the clarification But there was one day delay in netting the clarification to the day on which the assessment proceedings have been concluded and hence this appeal. In view of this position, the AO is directed to delete the same.

6B. The second issue is regarding payments made to M/s Raghava & Co amounting to Rs 38,02,376. It is almost similar to the impugned transaction as discussed at Para 6A but for the material involved. It was bitumen there, where as it is oils, lubricants & some chips here. The appellant used to barrow these things in the hours of need and make the payments. But, however, when the managing Partner was examined by the AO under section 131, as per the AR, in confusion, he said that the M/s Raghava & Co is a sub contractor, which was not correct. For such a statement, the AO held that the impugned payments to subcontractor were made without deducting tax at source and accordingly made the impugned addition in terms of the provisions of section 40(a)(ia), which is under challenge now. Perusal of records revealed that M/s Raghava & Co is no doubt a fellow contractor of works, but the material on record would not give rise to giving part of work of laying of roads to M/s Raghava & Co, but only borrowing oils and lubricants on exigencies It may however be noted here that ether the appellant or M/s Raghava & Co are in the business of supply of oils and lubricants to regard such transactions as contracts or subcontracts. In the circumstances, such statements made inadvertently by the Managing Partner would not make the relation of debtor and

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creditor to that of a contractor and contractee. In light of such a situation there is no question of invoking section 194C cum section 40(a)(ia) and as such the AO is directed to delete the same.

6D. *The fourth issue is regarding invoking the provisions of section 40A (3), i.e. payments in cash, where each payment exceeded Rs 20,000 and such payments for the year under report amounted to Rs 2,18,63,350/- which was one of the additions made by the AO, while finalizing the assessment proceedings. The AO in course of the assessment proceedings has obtained copy of bank account with ING VYSYA Bank, Governorpet Branch vide CC No 413 along with copies of the cheque leaves (both obverse and reverse) for examining the genuineness of payments. Such examination revealed that wherever there was withdrawal either the name of the party to whom money was given or the name or number of the account to which the money was transferred or details of clearing inward or outward is mentioned. The cheque leaves specifically give the details of cash paid across the counter or/and also transfer through accounts. The copies of cheque leaves so received were verified with reference to the cash book and ledger maintained by the appellant and the AO found that majority of them were bearer cheques only. It is the finding of the AO that on many occasions the appellant has either issued self cheques or bearer cheques in the name of the third parties, but the same were en-cashed by the accountant of the appellant firm or the Managing Partner on some occasions. Thus, with the help of the accountant of the appellant firm, the AO has made a table comprising third party cheques issued, which is annexed to the assessment order, with details like Serial no, Name of the person in whose name cheque was issued, amount, purpose, ledger/CB No, remarks etc, whose total amount was Rs 2,18,63,350. It is observed by the AO that such cheques were en-cashed by the concerned parties without routing through bank accounts. It was further observed by the AO that the appellant has booked such expenses towards various heads like labor, chips, oils, lubricants etc where by the AO was not suspecting the purpose for which the cheques were issued, but since these were en-cashed across the bank counter, these were nothing but cash payments exceeding in each case Rs 20,000 and thus invoked the provisions of section 40A(3) of the IT Act, 1961 and sought an explanation as to why such payments could not be added back while finalizing the assessment proceedings. As seen from the records, the appellant inter alia, informed the AO that such cheques were issued to the suppliers of material as requested by them and also to labor masteries to disburse to other laborers under his control thus, pleaded that such payments were made for business purposes and as such not coming under the purview of section 40A(3) and requested the AO to drop such proposals. It was further explained to the AO that the appellant's work was road laying mostly in remote areas and naxal prone regions, where getting labor and materials is very difficult. The labor and suppliers of material demand advance payment of the amounts involved, which the appellant is bound to accept in the interest of smooth running of road laying works. Thus, the bearer cheques were given in advance and get the work done with the cooperation of everyone involved and thus, en-cashing of the bearer cheques occurs in the nature of activities of road laying civil works of the appellant from year to year. During the appellate proceedings, it was pointed out by the AR that it is the consistent nature of work occurring every year, which was not questioned in the earlier years and questioned the rationale of the AO to raise this point now for this assessment.*

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year having accepted the same in the earlier years Thus, there is a merit in the submissions of the appellant that the AO was not justified in invoking the provisions of section 40A (3) in the peculiar facts and circumstances of the present case To sum up, (i) there was payment against supply of material or providing labor force (ii instead of paying to each laborer, there is a system of paying to masteries, who in turn pays to individual labor of his group, which is recognized, (iii) no fraud in payments was detected, (iv) bearer cheques were issued in advance to ensure supply of material and having adequate labor force to execute the road laying works in rural and remote naxal prone areas as per the schedule of completion of works within the time frame prescribed and (v) the citations of case laws furnished by the appellant helps him to steer through the mess with clean image as it is the business expediency which has helped the appellant to execute the works as per the schedule prescribed For these reasons, I am of the considered opinion that the AO was not justified in disallowing the impugned payments and accordingly, he is directed to delete the same."

4. Against the order of the Ld.CIT(A), the revenue filed appeal challenging the deletions made by the Ld.CIT(A) and the assessee filed cross objections, supporting the deletion of addition made by the Ld.CIT(A). During the appeal hearing, the Ld.DR submitted that though the AO posted the case on 17 occasions and there was no cooperation from the assessee to complete the assessment and always, the assessee was non-compliant. Either the assessee was seeking adjournment or furnishing the information partly in bits and pieces. The assessee has not produced the bills and vouchers for various expenses. Even the ledger accounts produced by the assessee before the AO shows huge differences between the amounts debited to P&L account in respect of chips, bitumen and oils for which the assessee had cited the reason of regrouping of certain heads of expenditure. Even for the summons issued u/s 131(1), the assessee failed to produce the books of accounts, vouchers and

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bills. With respect to addition in respect of PCL, the Ld.DR submitted that initially, the assessee has accounted the expenditure under the head 'oils and lubricants', subsequently, on verification of the ledger account, when the AO pointed out the huge difference between the books of accounts and the P&L account, the assessee has changed its stand and stated that the amounts were paid to M/s PCL for purchase of chips and dust. On verification from the PCL, the PCL had stated that there were no transactions with the assessee from 01.04.2007. Though subsequently, PCL has confirmed the supply of material to Managing Partner of the assessee, there was no evidence to show that the said material was used by the assessee and it is not known whether there was any specific personal business to the managing partner. Therefore, argued that the assessee failed to establish the genuineness of the expenditure, hence, the AO rightly made the addition.

4.1. In respect of payment to M/s Raghava & Co., the same were accounted under the head 'earth work and oil and lubricants' by passing journal entries. When the assessee was asked to produce basic evidences for the entries made in the books of accounts, the assessee failed to furnish any evidence to support its contention. In the statement recorded, the assessee stated that M/s Raghava & Co., is a sub contractor. From the basic facts, it is evident that

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genuineness of the expenditure is doubtful and having confirmed by the assessee that M/s Raghava & Co. is a sub contractor, the Ld.DR argued that the AO has rightly made the addition u/s 40(a)(ia) of the Act.

4.2. Referring to disallowance made u/s 40A(3) of the Act, the Ld.DR argued that though the assessee tried to make exceptions under Rule 6DD of the Act, the payments made were not covered by any of the exception under Rule 6DD of the Act. The assessee tried to show that the payments were made through cheques in third party's names which were encashed across the counter, against the provisions of section 40A(3) of the Act. The assessee had issued the bearer cheques and withdrawn the amounts and made the payments in excess of threshold limit to various suppliers of the materials in violation of section 40A(3) of the Act. Though the assessee claimed that the payments were made in exceptional circumstances, the assessee failed to establish the instances covered by exception under Rule 6DD of I.T.Rules. Whatever submission made by the assessee was general in nature and very vague. The assessee failed to establish the payment with matching date with regard to the exceptions covered under Rule 6DD of I.T.Rules. Taking to Annexure-1, the Ld.DR argued that though the assessee stated that the payments were made for labour / masteries, verification of Annexure-1 clearly shows that except 16 persons out

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of 66 items in total were paid for labour charges and all other payments were made for purchase of material. Even in respect of 16 persons, where the labour charges were mentioned in the annexure, the assessee has not submitted the details of the labour working under mastery with the dates on which the labour was deployed, number of employees deployed and the payment made to each person etc. Therefore, the Ld.DR vehemently argued that the payments were made for purchase of oils, lubricants, chips etc. which required to be paid by crossed cheque. Though the assessee claimed to have paid on Sundays and bank holidays, the assessee has not brought on any evidence to show that the payment was made on holiday. When bearer cheques were issued and were encashed across the counter in the bank there is no bank holiday and accordingly argued that the assessee has clearly violated the provisions of section 40A(3) and the AO rightly made the addition u/s 40A(3). The Ld.DR further submitted that the Ld.CIT(A) did not consider all the facts and simply relied on the explanation offered by the assessee and deleted the addition. The Ld.CIT(A) relied on general explanation offered by the assessee instead of going into the details of the case while deleting the addition. Accordingly, the Ld.DR argued that the Ld.CIT(A) committed an error in deleting the addition and requested to set aside the order of the Ld.CIT(A) and confirm the addition.

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5. Responding to the argument of the Ld.DR, the Ld.AR argued that the assessee is a civil contractor and during the assessment proceedings, the assessee has produced the books of accounts, bills and vouchers before the CIT(A) which the Ld.CIT(A) has called for the remand report and the AO stuck to his guns and did not make verification, therefore, argued that it has produced the books of accounts in respect of the payments made to PCL also. Though the assessee has produced the evidences at the remand stage, supporting all the expenses the AO did not examine the books of accounts, bills and vouchers furnished before the Ld.CIT(A), therefore, argued that there is no justice in making the additions by the AO separately. The Ld.AR further argued that the assessee is a civil contractor laying roads and production of pucca vouchers and bills is impossible. Accordingly, the Ld.AR requested to uphold the order of the Ld.CIT(A) or send back the file to the Ld.CIT(A) to reconsider the issue.

6. We have heard both the parties and perused the material placed on record. With regard to the payments made to PCL, the AO has found that there was difference in the ledger account and the figures mentioned in the audited P&L account in respect of chips, bitumen, oil and lubricants. The assessee

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submitted that the differences were due to regrouping of certain expenditure. Subsequently, the assessee reconciled the differences and submitted before the AO stating that the earlier rough day book was presented and no variation with regard to the amounts. The assessee stated to have made the payments of Rs.1,00,85,000/- for purchase of chips and dust purchased from PCL. The amounts were debited in the P&L account for lubricants and oils and the assessee claimed to have made the payments for purchase of chips and dust. Though the payments were made through cheques, the PCL has neither confirmed the transaction nor issued the pucca bills to the assessee. Though the PCL stated to have issued the clarificatory letter for supply of chips and dust, the same was issued to the Managing Partner, but not to the assessee. It is not known whether the managing partner is having separate individual business apart from partnership firm. The Ld.CIT(A) misdirected himself to rely on the clarificatory letter issued by PCL in the name of Managing Partner without supporting documents of stock register and the consumption register and the proper bills.

6.1. In respect of Raghava & Co., though the managing partner had stated that he was a sub contractor and executed part of the work, the Ld.CIT(A) misdirected himself in believing that the managing partner has given a

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statement in confusion. When the assessee has made payments to Raghava & Co., it is incumbent upon the assessee to establish the nature of payment furnishing proper bills supporting the supply of material with stock register and consumption register. No supporting evidences were placed before the Ld.CIT(A) or before the AO.

6.2. In respect of the payment made otherwise than crossed cheques for expenditure in violation of the provisions of section 40A(3) of the act, the assessee has made the payments in as many as 66 items as per Annexure-1 and out of which only payments made to 16 persons were related to labour payments. Remaining 50 plus payments were made for purchase of chips, oil and lubricants and kachha payments. All the payments were made in excess of Rs.1 lakh to each recipient against the provisions of section 40A(3) of the act. Though the assessee submitted that the payments were genuine and for the business purpose, the assessee has not produced any evidence to establish that the payment is genuine. The assessee has neither produced proper bills nor explained the reasons for payments made otherwise than by crossed cheque. Even for labour charges, the assessee has not furnished the details of mastery and labour attached to each mastery and the number of days the labour employed by each mastery etc. Though the assessee stated to have made the

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payment on bank holidays, it did not establish that the payments were made on bank holidays and in exceptional circumstances as provided under Rule 6DD of I.T.Rules. The very fact that the bank cheques were encashed across the counter shows that there was no holiday on the same date. Therefore, we are unable to accept the contention of the assessee that the payments were made in exceptional circumstances.

7. During the appeal hearing, the Ld.AR stated that the assessee has produced the books of accounts and vouchers before the CIT(A) and the Ld.CIT(A) called for the remand report which the AO did not examine. The argument made by the Ld.AR was incorrect as verified from the order of the Ld.CIT(A). In Ld.CIT(A) order page No.16, the Ld.CIT(A) has mentioned that the assessee has filed written submissions which were forwarded to the AO for his comments. It is observed from the order of the Ld.CIT(A) that the assessee has filed written submissions in response to which the AO submitted the remand report. From the assessment order, it is observed that the assessee has not produced the vouchers, bills in support of journal entries for expenses. Originally, the assessee had produced the books of accounts, in which there was huge variation in the audited P&L account, in respect of chips, oil and

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lubricants. The assessee did not establish that the payment of PCL for supply of chips as per the stock registers. In respect of Raghava & Co. also the assessee did not furnish any evidence and there was no clarity with regard to the payment whether for supply of chips or oil and lubricants or for sub contract works. The assessee freely making payments in cash and camouflaging the payments through cheques. Though the assessee has issued the bearer cheques and the payment was made otherwise than crossed cheque, the same was not reflected in the books of accounts as cash payments. Before the AO, the assessee failed to produce the books of accounts. In the remand report, the AO stated that on 16.09.2010, though the assessee stated to have produced the vouchers as per their letter, it has not produced the same. The assessee has addressed letter to Ld.CIT and stated that original vouchers could not be produced which is a draw back in any contractor's cases, who execute the civil works at sites. Subsequently in the statement on 20.12.2010, the managing partner of the firm stated that no vouchers are maintained for day to day transactions. On 29.12.2010 also the assessee firm contended that pucca vouchers could not be produced since the vouchers were self made. Though the books of accounts were audited u/s 44AB of the Act, the CA never clarified regarding the availability and maintenance of vouchers. From the Ld.CIT(A)

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order, it is observed that the assessee himself has stated in letter in page No.9, that it has made payments in cash to labour supplier, oils and lubricants, dust and chips in violation of section 40A(3) and wrongly grouped the sum of Rs.1,50,00,000/- under chips instead of labour charges in letter dated 29.12.2010. Pucca vouchers could not be produced for labour, loading and unloading of earth work, chips etc. Only kachha vouchers for chips were maintained. The assessee further stated in respect of 40A(3) submissions that the assessee has to make purchases from unorganized sector and the supplier did not issue the pucca vouchers. Production of original vouchers are not practicable and possible in this case. The assessee also requested for rejection of books of accounts and estimation of income reasonably.

From the above discussion, it is clear that the assessee has not maintained the proper books of account and expenses debited to the P&L account was not properly grouped and supported by pucca vouchers. During the appeal hearing also, the Ld.AR did not place any evidence to support the arguments. The Ld.AR requested to send the case back to the file of the Ld.CIT(A). In the absence of proper books of accounts, bills and vouchers, no useful purpose would be served even the issue is remitted back to the file of the Ld.CIT(A). Therefore, we are of the considered opinion that this is a fit case

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for rejection of books of accounts and estimation of income. Therefore, taking into consideration of all the facts and merits of the case and basis from KNR Constructions of ITAT Hyderabad Bench, we hold that assessee's case is fit case for estimation of income @12.5% on main contracts and 5% on sub contracts before depreciation and interest and remuneration to partners. Accordingly, to meet the ends of justice, we direct the AO to estimate the income @12.5% before depreciation, interest and remuneration to partners. However, the income after giving effect to the order of this Tribunal should not be less than the returned income or should not be less than the income arrived at as per the first appellate authority or more than the assessed income.

8. The cross objections of the assessee are supportive of the order of the Ld.CIT(A), thus, the cross objections also stands partly allowed.

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9. Ground No.1 and 5 are general in nature, which does not require specific adjudication.

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10. Ground No.2 and 3 are related to the estimation of income. In the instant case, the AO estimated the income @12.5% on main contracts and 5% on sub contracts, taking the basis from KNR Constructions of ITAT, Hyderabad.

11. Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) directed the AO to estimate the income @11% on main contracts and 5% on sub contracts. The Ld.CIT(A) also allowed the depreciation.

12. Against the order of the Ld.CIT(A), the assessee is in appeal before this Tribunal.

13. We have heard both the parties and perused the material placed on record. The assessee's case is having lot of defects in the books of accounts as discussed earlier in this order. The assessee neither substantiated his case to arrive at true and correct income nor established that the income of the assessee is less than 12.5%. The assessee is in the civil contracts, making huge payments otherwise than the crossed cheque and also did not establish the genuineness of the payments made to various persons in the earlier years. In the immediately preceding assessment year, we have held that the estimation of income @12.5% on main contract and 5% on sub contract is reasonable.

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Respectfully following the view taken in the assessee's case for earlier assessment year i.e. 2008-09, we hold that estimation of income @12.5% on main contracts and 5% on sub contracts is reasonable. Accordingly, we set aside the order of the Ld.CIT(A) and partly allow the appeal of the revenue.

14. Ground No.4 is related to the addition on account of unexplained creditors. In the assessment order, the AO made the addition of Rs. 35,50,000/- relating to unexplained creditors. Though the assessee has furnished the confirmation letters, the AO did not accept the genuineness of the creditors for non production of bank statements, income tax assessment details etc.

15. Against the order the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) found that the assessee has furnished the address of the creditors and the payments were received through cheques or RTGS. Hence, the assessee has discharged it's onus and the AO did not shift the burden on the assessee, therefore, held that there is no case for making addition u/s 68 of the Act.

16. Against the order of the Ld.CIT(A), the revenue has filed appeal before this Tribunal.

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17. We have heard both the parties and perused the material placed on record. From the order of the AO as well as the Ld.CIT(A), the assessee has furnished the confirmation letters with full details of the address and the payments were received through cheques or RTGS and there was no cash payments. Therefore, the burden was shifted from the assessee to the AO and it is for the AO to establish that the contents of the confirmation letter were false or incorrect. The AO did not make any enquiries for verification of the genuineness of the transactions. Therefore, the AO did not shift the burden to the assessee, hence the finding of the AO that the assessee has not proved the genuineness, credit worthiness and identity is incorrect and there is no case for making the addition on account of unsecured creditors. Further, the Ld.CIT(A) relied on the decision of Hon'ble Andhra Pradesh High Court in the case of Maddi Sudarsnam Oil Mills Co., Vs. CIT (1959) 37 ITR 369, where in Hon'ble High Court held that if the income tax authorities have rejected the books of accounts, they cannot make addition on account of unexplained cash credit on the very same books. Therefore, we do not find any infirmity in the order of the Ld.CIT(A) and the same is upheld.

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18. In the result, appeals of the revenue for the A.Y. 2008-09 and 2012-13 are partly allowed and cross objections of the assessee for the A.Y.2008-09 are also partly allowed.

Order pronounced in the open court on 4th October, 2019

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER
विशाखापटणम /Visakhapatnam
दिनांक /Dated : 04.10.2019

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

L.Rama, SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. राजस्व/The Revenue -Asst.Commissioner of Income Tax, Circle-3(1), Vijayawada
2. निर्धारिती/ TheAssessee-M/s Sri Bhaskar Contractors Company, D.No.60-3-27, F.No.101, Sai Aniketh Apartment, ITI Bus Stop, Ashok Nagar, Vijayawada
3. The Commissioner of Income Tax, Vijayawada
4. The Commissioner of Income Tax (Appeals), Vijayawada
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam