

**IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA Nos. 284/NAG/2016
(ASSESSMENT YEAR 2012-13)**

MKS ACME BUILD PVT. LTD. 905, B-WING LOKMAT BHAVAN, WARDHA ROAD, NAGPUR - 440 012 PAN: AAHCM0383J	Vs	D.C.IT. CENTRAL CIR. 2(1) AAYAKAR BHAVAN, CIVIL LINES, NAGPUR - 440 001
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

Appellant by	:	Mr. K.P. Dewani (AR)
Respondent by	:	Mr. A.R. Ninawe (DR)

Date of Hearing	:	19.06.2017
Date of Pronouncement	:	30.06.2017

**आदेश
ORDER**

PER P.K. BANSAL, V.P.:

In this appeal, filed by the assessee, the assessee has taken the following grounds of appeal:

1. The order passed by A.O. is illegal, invalid and bad in law and consequent thereupon is liable to be cancelled.
2. The learned CIT(A) ought to have directed to accept the income as shown in return filed u/s. 139 of I.T. Act 1961.
3. The learned CIT(A) erred in not accepting the prayer of assessee to adopt net receipt for determining the estimated income at the hands of

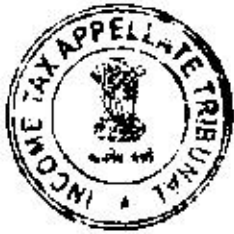


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assessee after excluding the recoveries made by the Government Departments on account of material supplied, sales tax and Service tax etc.

4. The addition made by learned CIT(A) by adopting 16% of receipts is unjustified, unwarranted and excessive.

5. The learned CIT(A) erred in enhancing income by Rs. 1,15,19,489/- in respect to activity of business.

6. The addition made by learned CIT(A) at Rs. 1,15,19,489/- to the income from business is unjustified, unwarranted and excessive.



7. The assessee denies liability to pay interest under section 234A, 234B and 234C of I.T. Act 1961. Without prejudice, levy of interest under section 234A, 234B and 234C of I.T. Act 1961 is unjustified, unwarranted and excessive."

3. Grounds No. 1 and 2 since not pressed therefore the same stand dismissed as not pressed.

4. In respect to the grounds no. 3 and 4, the Ld. AR before us contended that the issue involved in this appeal is similar to the issue involved in assessee's appeal in the case of Mitesh Bhangdiya ITA No. 261-265/NAG/2016 and whatever view this Tribunal may take in the case of Mitesh Bhangdiya same may be taken in the case of the assessee. Ld. DR also agreed for the same.

5. We have heard the rival submission and carefully considered the same. We have gone through the order of this Tribunal in the case of Mitesh Bhangdiya in ITA No. 56 - 61/NAG/2016 and 261-265/NAG/2016. We noted in that case Tribunal has passed the consolidated order in the appeals filed both by the

assessee as well as by the Revenue by holding vide order dated 29.06.2017 as under:

"12. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that the facts and the issue involved in all the years under appeal in the case of the assessee are similar and identical. The CIT(A) has passed a consolidated order. The undisputed facts in the case of the assessee and the group concern are that a search and seizure action u/s 132 of the Act was carried out in the Bhangdiya Group of cases on 19/07/2011. Simultaneously, the business and residential premises of the assessee were also searched. During the course of search conducted, incriminating papers and documents were found and seized. Shri Mitesh Gotumal Bhangdiya is the key person of the group. Shri Mitesh Bhangdiya has two sons namely Shri Kirtikumar M. Bhangdiya and Shri Srikant M. Bhangdiya and one daughter Neha. The business of the Bhangdiya group is being looked after by Shri Mitesh Bhangdiya and his two sons. The other key persons associated with the group are Shri Sanjay Rameshchandra Heda, husband of Mitesh Bhangdiya's sister, Smt. Pradnya, resident of Amravati and Smt. Manisha O. Maniyar, widowed sister of Shri Mitesh Bhangdiya who lives with Bhangdiya family.

12.1 The main business concerns of the group (including those discovered as a result of the search action) are as follows –

1. M/s M.G. Bhangdiya (AERP2503E), (Prop. MGB); converted into a company M/s M.K.S. Constro-venture Pvt. (AAHCM0383T) Ltd. from 01.04.2011.
2. M/s Mahendra Construction, Prop. Shri Sanjay Heda (MC) (AADPH7109J)
3. M/s Mahendra Construction 85 M.G. Bhangdiya (JV) (AANFM5658B)
4. M/s Kirtikumar M. Bhangdiya (Prop. KMB); converted into a company M/s M.K.S. Acme Buildcon Pvt. Ltd. (AAHCM0382K) from 01.04.2011. (AGYPB1659G)
5. M/s K.M. Bhangdiya & Mahendra Construction (JV) (AAKFK1820C)
6. M/s Shrikant M. Bhangdiya (Prop. SMB)(ATCPB1337J)
7. Mitcon Infraproject Pvt. Ltd. (MIPL) (AAGCM1868H)

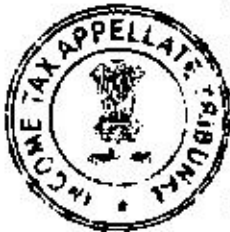


8. Lokshahi Publications Pvt. Ltd. (LPPL)(AABCL6673L)
9. MITZ Infraproject Pvt. Ltd.(AAGCM3047A)
10. Sakshi Gruh Nirman Pvt. Ltd. (SGNPL)(AAOCS7974G)
11. Balaji Stone Crusher & Infraventure Pvt. Ltd.(AADCB5273C)

12.2 The group has also entered into joint ventures with various other civil contractors of the city to secure some civil contracts. A few of them are listed below:

1. M/s M.G. Bhangdiya & Hitbhav Engg (JV) (AAOFM4745L)
2. M/s M.G. Bhangdiya & S. S. Patil & Co. (JV)(ABIFS3645L)
3. M/s Darshan Construction (JV) (AAHFD0654N)
4. M/s M R Dhoble & K M Bhangdiya (JV)(AAPFM0622B)

12.3 The nature of the business of the Bhangdiya group primarily is executing civil contracts. The group works mainly for Government departments like M/s Vidarbha Irrigation Development Corporation and has been engaged in executing various contracts pertaining to the irrigation projects in the state of Maharashtra. During the course of search operations incriminating documents were found and seized from the residential premises of Shri Mitesh Bhangdiya. Item no. 1 to 65 of Annexure-B seized from his residence are the diaries containing ledgers, daily cash books and bank books maintained by the Bhangdiya group. 36 Cash books contained entries for the period from 26/07/2006 to 18/07/2011 and 27 diaries relate to the financial year 2006-07 to 2010-11 whereas the remaining two diaries were maintained for house hold and miscellaneous expenses. A statement of Shri Mitesh Bhangdiya was recorded on oath on 20.07.2011. In his sworn statement recorded during the course of search action, Shri Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked as B-1 to B-65 and to explain the contents of these diaries, Shri Mitesh Bhangdiya in his statement recorded has submitted that the entries in the diaries and the ledger pertain to the business receipts and business expenditure. The Assessing Officer in the assessment order has recorded a finding that as per the item no. 1 to 65 of annexure-B, it is apparent that the amounts withdrawn from the bank accounts of the sub-contractors were credited to the daily cash balance of Bhangdiya group which was confirmed by Shri Mitesh G. Bhangdiya in his statement dated 14/09/2011. The Assessing Officer has reproduced the statement of Shri Mitesh Bhangdiya recorded on 14/09/2011 in para 6 of the assessment



order. The Assessing Officer in the assessment order has also recorded a finding that the seized documents being B-1 to B-65 contain entries of all expenses incurred by the Bhangdiya group in cash from F.Y. 2006-07 onwards and expenses incurred through the bank accounts from F.Y. 2009-10 onwards. Thus, the Assessing Officer found that the actual expenses incurred do not match with those shown to have been incurred in the books. The Assessing Officer thus concluded that the books of account of Shri M.G. Bhangdiya maintained for income-tax purpose do not reflect the true business affairs and are not at all reliable. The Assessing Officer analyzed the entries in the diaries and took the view that on receipt side various receipts including the withdrawal from the bank of the assessee group concerns were recorded and on payment side entries of expenses like interest payment, repayment of loan, deposit into bank account, household expenses, personal expenses, payment to various persons in cash and investment in properties are found recorded. It was also noted by the Assessing Officer that some of the entries made in the seized diaries were found reflected in the books of account maintained by the Bhangdiya Group. Statement of Mitesh Bhangdiya was recorded on 20/07/2011. During the course of search, Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked B-1 to B-65. In reply to question No. 30 of his statement, Mitesh Bhangdiya submitted that the entries in the diaries and ledgers pertain to the business receipts and business expenditure but at present it is very difficult for him to state whether the entries recorded in the seized diaries and accounted in the regular books of account and same can be explained only after verification of the entries of the diaries with the regular books of account maintained by the Bhangdiya Group. Shri Mitesh Bhangdiya, reply to question No. 38, we noted voluntarily offered additional unaccounted income of Rs.26 crores for the block period including the current financial year over and above the regular income declared in the return filed for the assessment year falling within the block period. The income so declared are summarized as under:

BHANGDIYA GROUP

Particular	AY 06-07	AY 2007-08	AY 2008-09	AY 2009-10	AY 2010-11	AY 2011-12	AY 2012-13	Grand Total (Rs.)
<i>M/s M.G. Bhangdiya</i>								
Contract Income as per original return	22,00,540	28,96,131	18,61,863	56,30,712	543,10,322	714,82,707		1383,90,275
Additional Income declared during Survey	23,97,361	11,94,009	27,04,312	1,50,336				66,46,018
Additional Income Offered During Search		5,09,860		27,18,952	576,81,678	255,17,293		864,27,783
Contract Income Declared	45,97,901	48,00,000	45,66,175	85,00,000	1120,00,000	970,00,000		2314,64,076



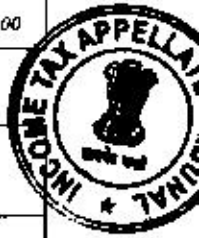
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<u>MKS Constro Venture P Ltd</u>								
Contract Income as per original return							182,75,373	182,75,373
Additional Income declared during Survey								
Additional Income Offered During Search							164,74,627	164,74,627
Contract Income Declared							347,50,000	347,50,000
<u>M/s. Mahendra Construction</u>								
Contract Income as per original return	36,77,656	125,10,051	26,48,924	20,60,666	73,38,074	76,26,315	7,58,488	366,20,174
Additional Income declared during Survey	40,41,896	49,17,076	7,14,112	11,13,224				107,86,308
Additional Income Offered During Search	26,80,448	37,72,873	18,36,964	8,26,110	128,61,926	101,73,685	26,41,512	347,93,518
Contract Income Declared	104,00,000	212,00,000	52,00,000	40,00,000	202,00,000	178,00,000	34,00,000	822,00,000

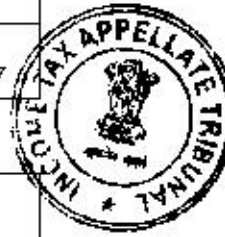
<u>M/s. Mahendra Const & M. G. Bhangdiya JV</u>								
Contract Income as per original return		157,47,756	310,92,743	715,14,147	358,75,320	74,77,336		1617,07,302
Additional Income declared during Survey		157,19,964	193,98,115	492,69,033				843,87,112
Additional Income Offered During Search				257,16,820	190,24,680	172,22,664		619,64,164
Contract Income Declared		314,67,720	504,90,858	1465,00,000	549,00,000	247,00,000		3080,58,578

<u>M/s. K. M. Bhangdiya</u>								
Contract Income as per original return	10,18,705	32,86,795	27,20,401	21,08,306	61,66,670	32,99,234		186,00,111
Additional Income declared during Survey	14,12,344	25,22,355	19,09,360	7,50,653				65,94,712
Additional Income Offered During Search		8,90,850	10,70,239	28,41,041	58,33,330	33,00,766		139,36,226
Contract Income Declared	24,31,049	67,00,000	57,00,000	57,00,000	120,00,000	66,00,000		391,31,049

<u>MKS Acme Build P Ltd</u>								



Contract Income as per original return						34,70,653	34,70,653
Additional Income declared during Survey							
Additional Income Offered During Search						16,29,347	16,29,347
Contract Income Declared						51,00,000	51,00,000
M/S M G Bhargava and Hbbhav Engg JV							
Contract Income as per original return		26,84,727	2,20,187	4,63,997	4,68,994		38,37,905
Additional Income declared during Survey		5,63,583	30,344				5,93,927
Additional Income Offered During Search			2,49,469		1,31,006		3,80,475
Contract Income Declared		32,48,310	5,00,000	4,63,997	6,00,000		48,12,307



M/s M.G Bhargava and SS PATIL JV							
Contract Income as per original return		6,65,923	4,77,544				9,43,467
Additional Income declared during Survey		6,01,929	8,38,586				14,40,515
Additional Income Offered During Search				40,000			40,000
Contract Income Declared		10,67,852	13,16,130	40,000			24,23,982
M/S K M Bhargava JV							
Contract Income as per original return				5,14,551	9,32,461		14,47,012
Additional Income declared during Survey							
Additional Income Offered During Search				5,85,449	11,67,539		17,52,988
Contract Income Declared				11,00,000	21,00,000		32,00,000

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Micon Infra Project P Ltd								
Contract Income as per original return				60,39,000	43,98,429	53,20,051	157,57,480	
Additional Income declared during Survey								
Additional Income Offered During Search				62,61,000	111,01,571	9,19,949	182,82,520	
Contract Income Declared				123,00,000	155,00,000	62,40,000	340,40,000	

Additional Income offered in cases of Individual								
Mitesh Bhangdiya							74,79,442	74,79,442
Kiretkumar Bhangdiya							30,00,000	30,00,000
Shrikant Bhangdiya							35,00,000	35,00,000
Keshar Singh Rotele			10,42,553	12,03,097	80,93,260			103,38,910
Consolidated For All Entities								
Contract Income as per original return	60,96,901	349,06,656	414,86,202	815,34,018	1107,15,934	956,85,476	278,24,565	3990,49,752
Additional Income declared during Survey	78,51,601	251,55,333	261,28,068	513,13,590				1104,48,592
Additional Income Offered During Search	26,80,448	51,73,583	29,07,203	323,92,392	1022,48,063	686,14,524	216,65,435	2356,81,648
Contract Income Declared	174,28,950	652,35,572	705,21,473	1652,40,000	2129,63,997	1643,00,000	494,90,000	7451,79,992
Additional Income in cases of Individual			10,42,553	12,03,097	80,93,260		139,79,442	243,18,352



12.4 From the statement of Shri Mitesh Bhangdiya, it is apparent that the diary found and seized belongs to the assessee group and the assessee group did not disown these diaries even though in the subsequent statement recorded on 27/07/2013 Shri Mitesh Bhangdiya stated that these diaries were primarily maintained by his father Gotumal Bhangdiya. The Assessing Officer, we noted, has also observed that these seized diaries also contain the payment made in cash for probable extraneous gratification to various persons including politicians, government officers/officials which are recorded along with their names, dates of payment and amount paid. We noted that the Assessing Officer has not examined these persons for bringing the corroborative evidence on record in support of his finding that the cash

has been paid by the assessee group for probable extraneous gratification. We noted that the Assessing Officer made an exercise to match the entries of the tax payment and receipt with the entries in the regular books of account of Bhangdiya Group. The Assessing Officer came to the conclusion that the receipts are predominantly withdrawals from the bank account by way of creating bogus sub-contract expenditure. The Assessing Officer found that the assessee group has deducted a sum of Rs.361 crores towards the sub-contract payment against the gross receipts aggregating to Rs.579 crores. It was found by him after verifying from 21 contractors that a sum of Rs.54.40 crore is attributable to the amount deposited in the bank account of the sub-contractor by account payee cheques by various concerns of Bhangdiya Group, which was subsequently withdrawn in cash and is reflected on the receipt side of the seized diaries. The total amount so reflected in the diaries on the receipt side was computed at Rs.182.52 crore. The Assessing Officer added the said unaccounted amount of Rs.182.50 crore in the income of the assessee group concern. A sum of Rs.54.40 crore was added in proportion to the amount of cheque credited by respective group concern in the hands of the respective group concerns. For the balance amount of Rs.128.12 crore, the Assessing Officer added the same in proportion to the contract receipt shown by the group concern in the respective assessment years to the total turnover of the group concern in that year. Now the question before us arises whether the said sum of Rs.182.52 crores, found recorded in the diaries found during the course of search as receipt being withdrawal from the bank account of the group concern as well as from the bank account of the sub-contractor can be regarded to be the unaccounted income of the assessee. At the micro level, if we look into the nature of the receipt, it is not denied by the Revenue that the receipt has come from the bank account of the assessee group concern and part of the receipt and has come out of the cash withdrawn by the sub-contractor to whom the assessee group concern had made the payment. The assessment has been made by the Assessing Officer u/s 153A in the case of the assessee as well as assessee's group concern. Proceedings have also been initiated by the Assessing Officer in the case of the sub-contractor u/s 153C of the Act. The sub-contractor has submitted the return in response to the notice u/s 153C. The sub-contractor has shown the income from the contract receipt being amount paid to them by assessee group. The said income has duly been accepted by the Assessing Officer on substantive basis in the hands of the sub-contractor. The Assessing Officer thus has duly accepted while framing the assessment of the sub-contractor that the payment received by the sub-contractor from the assessee as well as the assessee group concern were not bogus but were the payment received by performing the obligation for a consideration entrusted on them under the sub-contract. This denotes that the relationship of the assessee as well as assessee group concern with the sub-contractor, as genuine, has duly been accepted by the Assessing Officer. Once the sub-contractor has been assessed and their income has duly been accepted by the

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Revenue, in our view, the Revenue, on the basis of the same facts in the case of the assessee, cannot take the view that the payment made to the sub-contractor were bogus. Further it is not the case of the Revenue that the Revenue has disallowed the payment made to the sub-contractor. It is a case where the Revenue has added the impugned receipt from the sub-contractor entered into the diaries found and seized during the course of the search. From the analysis of these diaries, the Assessing Officer has categorically given the finding that the diaries consist of the receipt being the withdrawal made by the sub-contractor as well as the withdrawal made by the assessee from the bank account of the group. The diary also consists of the payment, some of which relate to the site expenses, expenses recorded in the books of account, investment in the immovable property, personal expenses, expenses for the jewellery as well as money transferred and the amount paid to various persons. It is not the case of the Revenue that the assessee has debited the amount paid to various persons into his regular books of account and claimed the deduction so that these expenses can be disallowed by applying the explanation to section 37 of the Act. In fact the assessee has not claimed deduction of these expenses. The Assessing Officer added the receipt being amount withdrawn by the contractor as income of the assessee. The receipt in fact is coming out of the sub contract receipt of the sub-contractor as well as assessee and group concerns, which has already been assessed to income tax by the Assessing Officer. The source of the receipt therefore, is apparent. Where the nature and source of the receipt stands explained, it cannot be added to the income of the assessee. On this basis itself, in our view, no addition in view of the cash withdrawn from the bank account of the group concern and the sub-contractor which are duly disclosed to the department, can be added in the income of the assessee.



12.5 This is not the case of Revenue that these cash withdrawals are from the bank account which have not been disclosed to the Revenue or in which the assessee has deposited the cash outside the books of account. So for the source of the receipt is concerned, it is not denied that the business of the assessee is executing the Government contract and all the receipts in the bank account of the assessee is generated only through the contract receipt from the contract taken from the State Government. No cogent material or evidence was brought to our knowledge which may prove that the State Government has made the payment to the assessee outside the books of account. On this basis itself, we confirm the order of CIT(A) that the addition cannot be sustained on the basis of cash receipt found recorded out of the cash withdrawal by the assessee or the contractor from their bank account. We also noted that the Assessing Officer has not only analyzed the receipt side of the diaries but has also analyzed the payment side of the diaries and found from the payment side that a sum of Rs.24.05 crore has been invested

in the immovable property outside the books of account and similarly, a sum of Rs.8.47 crore has been utilized as expenses outside the books of account. As regards to observation of outgoings observed by the Assessing Officer in respect of seized document, it is noted that the Assessing Officer has mainly drawn adverse inference without there being any material evidence on record for such conclusion. Even before us, no corroborative evidence were referred to and brought on record. Thus, the outgoing/investment to the extent of Rs.32.52 crore can be regarded to have been incurred by the assessee outside the books of account but the same are spent out of money withdrawn from bank, the source thereof cannot be regarded to be unexplained. We noted that in this case the assessee as well as assessee group concern, during the course of search, surrendered a sum of Rs.26 crore and accordingly, filed the return in response to the notice u/s 153A. At the most the Assessing Officer could have made the addition in respect of the unaccounted investment provided they are not covered by the amount surrendered by the assessee during the block period. In fact, in our view, the source of the said expenditure shown in the diary is also coming out of the cash withdrawal from the banks of the group concern as well as of sub-contractor which has already been disclosed to the Revenue and the receipt thereof has already been assessed to income tax.



12.6 We noted that the business income assessed by the Assessing Officer in percentage of the gross receipt in the hands of the various group concern varies from 9.34% to 129.92% as is apparent from the following chart:

Particular	AY 2006-07	AY 2007-08	AY 2008-09	AY 2009-10	AY 2010-11	AY 2011-12	AY 2012-13
M/s M.G. Bhangdiya	11.79%	41.27%	35.60%	18.60%	27.46%	49.50%	
MKS Constro Venture P Ltd							9.34%
M/s. Mahendra Construction	10.78%	43.13%	25.44%	11.04%	21.79%	33.05%	27.73%
M/s. Mahendra Const. & M. G. Bhangdiya JV		49.53%	73.44%	17.69%	41.81%	16.03%	
M/s. K. M. Bhangdiya	11.97%	23.39%	26.76%	26.26%	15.22%	13.94%	
MKS Acme Build P Ltd							10.28%
M/S.M G Bhangdiya and Hitbhav Engg JV			66.53%	11.98%	27.83%	0.00%	
M/s M G Bhangdiya and SS PATIL JV		54.82%	129.92%	13.18%			

M/S K M Bhangdiya JV					25.28%	39.52%	
Mitcon Infra Project P Ltd					10.07%	10.00%	10.00%
Consolidated	12.36%	47.01%	74.36%	18.52%	34.25%	49.97%	44.59%

In the case of the assessee group the assessment u/s 153A have been framed for assessment year 2006-07 to assessment year 2011-12 while assessment for the assessment year 2012-13 u/s 143(3) of the Act. The nature of the activity being execution of government contract was the same during all the assessment years. In assessment year 2006-07, the nature of the work executed for Vidarbha Irrigation Development Corporation remains the same as in the case of the assessee for subsequent assessment years. The sub-contractors, who have executed the work, are also similar in various assessment years. The Assessing Officer, we noted, in the case of the assessee group for the assessment year 2006-07, has accepted the income as shown by the assessee group in the return about 12% of the gross receipts. The Assessing Officer, as is apparent from the aforesaid chart, has assessed the income on different footing in the subsequent assessment years under the similar circumstances. There had been search in the case of the assessee. The nature of the business of the assessee remains the same. No other business activity or the business were found from where the income is derived or generated. In various noting in the seized documents i.e. diaries are part of the gross receipt of the contract receipt of the group entity, is not disputed. The Assessing Officer, while making the addition, observed that the amount withdrawn from the diary is utilized for unaccounted payments which are not allowable like gratification paid to politician and Government officials. However, the Assessing Officer does not refer to any corroborative evidence on record to hold that the assessee has made payment as illegal gratification. He has taken a view by observing that payment made in cash is probable extraneous gratification. During the course of search, statement of Shri Mitesh Bhangdiya was recorded on 20/07/2011 and he in answer to question No. 30 explained that the seized documents are details of cash flow. During the assessment proceedings Shri Mitesh Bhangdiya has explained that the diaries are noting for the movement of the cash in reply to question No. 23, in the statement recorded on 27/07/2013. It was also explained by him in the course of the assessment proceedings that the sub-contractors on the withdrawal of the money gave to his father for safe custody, the amount which are found to be noted in the seized documents. In the statement recorded, the assessee has clearly explained that the notings made in the seized documents has nothing to do with the political leaders as much as political leaders have no business transactions with Bhangdiya group. Even we noted that the Assessing Officer has not brought out on record any



specific evidence to show that payment is made to any politician or the Government officer/official to whom the gratification payment have been given by the assessee group. We noted that the Assessing Officer out of the sum of Rs.182.52 crores, added Rs.54.40 crores on the basis of deposition of the sub-contractor for which when the assessee has asked for the cross examination, the cross examination was not allowed to the assessee, which is contrary to the principles of natural justice. Hon'ble Supreme Court in the case of *Andman Timber Industries vs. Commissioner of Central Excise, Kolkata* (Civil Appeal No. 4228 of 2006), under the similar circumstances, when the adjudicating authority did not allow the cross examination of the witnesses, held as under:

"According to us, not allowing the assessee to cross examine the witness by the Adjudicating Authority though the statements of those witness were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.

In view of the above, we are of the opinion that if the testimony of these two witness is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witness was the only basis of issuing the Show Cause Notice.

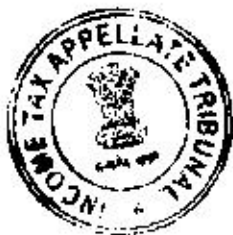
We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal"

Following the said decision of Hon'ble Supreme Court, the statement of the sub-contractor, in our view, cannot be relied on. Even otherwise also, we noted that no corroborative evidence being brought on record to prove that the receipts, which has been added by the Assessing Officer in the income of the assessee is the undisclosed income of the assessee. In fact the receipts for which the addition has been made by the Assessing Officer represents the part of the gross receipts of the assessee and assessee group concern and the sub-contractor, which has duly been taxed to income tax. As pointed by us earlier, due to this addition, there has been huge variance in the income assessed as percentage with the receipts by the Assessing Officer. The CIT(A) therefore, was correct in rejecting the basis of making the addition by the Assessing Officer. In the facts of the present case, it is seen that regular assessment came to be made as net profit percentage of receipts and which



were also upheld in appellate proceedings and have achieved finality. The returns u/s 153A have also been filed as percentage of receipts in this group entities. It will only appropriate to determine the income as percentage of receipts as the same are available on record which are accepted by the assessee and the Revenue authorities without dispute.

12.7 We may mention that in the case of the assessee group, survey action was conducted on 17/02/2009 wherein under the similar situation, the payment to sub-contractor was disputed and doubted by the Assessing Officer. The survey action relates to the assessment year 2006-07 to 2008-09, which are part of the block period for the search action conducted on 19/07/2011. The Assessing Officer while making the assessment applied a net profit @14% but when the matter reached to the Tribunal, the Tribunal Nagpur Bench in I.T.A.Nos. 268, 269 and 285/Nag/2012 vide order dated 03/04/2013, after considering the impounded material, directed the Assessing Officer to adopt the net profit @12% as against the net profit adopted by the Assessing Officer @14%. There are also the similar type of defects found as have been found in the course of search. We noted the CIT(A) has in the impugned assessment years made in consequence of search, directed the Assessing Officer to estimate the profit @16% and not @12%. Even though the CIT(A) was fully aware of that during the assessment year 2006-07 to 2009-10, the assessee group has surrendered additional income at Rs.11 crore and the Tribunal has directed the Assessing Officer to estimate the net profit @12%. The Tribunal in that order under para 4 observed as under:



"4. Brief facts of the case are that a survey u/s. 133A of the Income Tax Act, 1961 was carried out in the business premises of the assessee and his associates on 17.02.2009. During the course of survey operations it was found that most of the bills, vouchers and other evidence in support of the entries in the books of account like labour charges, material purchases, machine hire charges, site expenses, sub contract expenses, oil and lubricants, repairs and maintenance etc. pertaining to this A.Y. were not available. Statement of Sri Mitesh Bhangadiya was recorded under Section 133A and u/s. 131 of the Act on behalf of the assessee. In the statement dt.24.02.2009 and 13.03.2009, in response to various questions relating to the genuineness of the payments to third party sub contractors and in respect to other deficiencies, the assessee admitted additional income in group cases of Rs. 11 crore and proportionately were allocated between all the assessment years relating to these four assessee.

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For the year under consideration i.e. for assessment year 2006-07 in case of Sri Mithesh Bhangadiya, the additional income was offered at Rs.23,97,361/- besides the income shown originally at Rs.23,63,910/-. Due tax was paid before the issuance of notice under Section 148 as admitted by the AO in para 2 of his order. The important contents of submission recorded on 24-02-2009 and 13-3-2009 of Sri Mithesh Bhangadiya are incorporated in the order of the AO. In query of question No. 11, it was answered that during the course of survey, it was noticed that there are certain discrepancies and omissions and to cover up all such discrepancies we have made out mind to offer additional income over and above the regular income. We are under the process to determine such additional income to avoid litigation and, to buy peace of mind. Thereafter in response to question Nos. 18 & 19 of the statement recorded on 13-3-2009, it was answered that the sub contractors were awarded the sub contract work by our firms as per contract notes and the nature of sub contractors has been that labour charges and machine hire charges. The sub contractors by and large illiterate and therefore, their books of accounts found to be incomplete, without maintenance of any bills and vouchers. The expenses incurred by our firm has been on the basis of the so called vouchers raised by them and therefore, there appears the discrepancies in the expenses claimed. It was further stated that the assessee has admitted in his previous statement recorded during the course of survey that there are certain discrepancies and anomalies in the sub contract expenses in their books of accounts, non availability of bills and vouchers for the past three assessment years. Accordingly, it was submitted that there were certain discrepancies and anomalies in the sub contract accounts, in books of accounts for assessment years 2006-07 to 2009-10. The assessee declared the additional income of Rs. 11 crore in their firm and the five sister concerns in the assessment year 2006-07 to 2009-10. The working of the additional income of Rs. 11 crores will be done accordingly and the same will be shown. These part of the statements have been incorporated in the order of the AO as state above. Thereafter the AO started scrutiny of the case. The AO noted that the assessee has shown various expenses under the head labour & wages, machine hire charges, site expenses and sub contract expenses etc. on very higher side, which are not supported by valid vouchers. Neither any further evidence was filed. It was also observed by the AO that since there are various deficiencies in accounts of sub contracts and the assessee has offered a sum of Rs. 23,97,361/- on account of discrepancies in respect



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to sub contract, therefore, he proceeded to make further addition on account of various deficiencies i.e. in absence of bills and vouchers, excess claim towards machinery hire charges, verification of applicability of provision of Section 194C and denial of alleged sub contractors regarding the sub contract given by the assessee. All these discrepancies are noted by the AO in his order. Thereafter in para 7, the AO has observed that after having rejected the books of account of the assessee under Section 145(3) of the Act, the profit of the assessee has to be estimated reasonably. The AO also observed that the assessee has declared net profit ratio of 6% and 7% of the total turnover in assessment years 2006-07 & 2007-08. After offering additional income of Rs.23,97,360/- for assessment year 2006-07, the results in revised net profit comes to 12.87% of the contract receipts. However, this net profit was found by the AO on lower side. The AO noted that in one of the group case namely, M/s. Mahendra Construction & M.G. Bhangadia (JV) , who had declared additional income of Rs. 1,57,47, 760/- in the Assessment Year 2007-08, which gives a net profit ratio of 13.84% of the net contract receipts. In view of these facts the AO adopted 14% net profit. Thereafter the AO completed the assessment and made addition of Rs. 30,12,722/- against additional income shown by the assessee at Rs. 23,97,360/-, which resulted further addition of Rs.6,15,362/-."



and ultimately under para 7 as reproduced hereunder, estimated net profit @12%:

"7. After considering the submission and perusing the material on record, we find that the assessee deserves to succeed in his appeal in part. We noted for the year under consideration i.e. for assessment year 2006-07, the assessee's NP rate comes to 12.87%, for assessment year 2007-08, the assessee's NP rate comes to 10.53%, respectively. We also noted that if the NP rate of all the concerns are taken into consideration, then it is seen that all the assesses have shown government receipt at Rs.258,55,37,850/- and income on these contracts have been shown by these assessee at Rs.6,49,57,111/- which gives a NP rate of 6.38%. The assessee has offered additional income declared during the survey at Rs. 11, 03,85,877/-, which gives a NP rate of 4.27% and the total NP rate in all these concerns comes to 10.65%. Of course, the additional income of Rs. 11 crore or odd was segregated proportionately on the basis of

contract receipts in the hands of each concern. In case of M/s Mahendra Construction & M.G. Bhangadia (JV), the NP rate comes to 13.84% i.e. for assessment year 2007-08 and this rate has been adopted by the AO and has applied the NP rate of 14% in all the years in case of all these assesses on whom a survey was conducted. In view, this approach of the AO was not correct approach. In case of M.G. Bhangadiya, the NP rate of three years come to 9.87%, whereas in case of other assesses i.e. Sanjay Heda, M/s Mahendra Construction & M.G. Bhangadiya (JV), the NP rate comes to 9.50% and in case of M/s Mahendra Construction & M.G. Bhangadiya (JV), the average NP rate of three years comes to 11.28% and in case of M/s Kirtikumar Bhangadiya, the NP rate comes to 8.72% and in case of M.G. Bhangadiya and M/s Mahendra Construction & M.G. Bhangadiya (JV), the NP rate comes to 6.12%. In case of M.G. Bhangadiya and S.S. Patil & M.G. Bhangadiya, the NP of three years comes to 11.55%. As stated above, the average NP rate of all the assesses for all the three years comes to 10.65%. Therefore, in our view, a rational approach should have been adopted by the AO or by the learned CIT (A). For one case i.e. M/s Mahendra Construction & M.G. Bhangadia (JV), the NP rate was 13.84% and if this rate is applied in all other cases, which in our view, is not justified. However, there is also no dispute that there were so many discrepancies in maintaining vouchers, bills, sub contracts accounts and other heads, which were not verifiable, therefore, the assessee and his group came forward to offer an additional income of Rs. 11 crore and the same has also offered and due tax has been paid. Since as stated above, there are certain discrepancies, we are of the view, that if NP rate of 12% is adopted instead of 14%, that will meet the end of justice. We made it clear that where NP rate shown by the assessee in any year is more than 12% then the more NP rate shown by the assessee has to be taken as assessee has declared himself and in other years where NP rate shown by the assessee is lower than 12%, then 12% NP rate has to be taken. The AO will recomputed the income accordingly. For the sake of clarification, in case of assessee for assessment year 2006-07, the NP rate comes to 12.87% after showing the additional income, therefore, the income shown by the assessee has to be accepted. However, for assessment years 2007-08 & 2008-09, the NP rate shown by the assessee after additional income comes to 10.69% and 10.53%. The AO will adopt the rate of 12% and will compute the income accordingly. "



12.8 We noted that the CIT(A) even though followed the order of the Tribunal in the case of the assessee for the assessment year 2006-07 to 2009-10 but directed the Assessing Officer to estimate the net profit during the block period @16% and for that he has given the reasons that there is material difference in the years under appeal i.e. search action has also resulted into detection of the unaccounted assets to the tune of Rs.26 crores and unaccounted jewellery of Rs.2.37 crores which has not been disclosed by the assessee group in their respective returns filed nor the source of such acquisition of such assets could be explained satisfactorily. We do not agree with such finding of CIT(A) as we noted that during the block period, the assessee has surrendered Rs.11 crore during the course of survey for the assessment year 2006-07 to 2008-09 and further during search a sum of Rs.26 crore was surrendered. Thus, a sum of Rs.37 crore was available with the assessee which assessee could have utilized for investment in the assets as well as for the purchase of jewellery. The unaccounted assets as well as unaccounted jewellery is only Rs.28.37 crore, which is much less and is duly covered by the disclosure of Rs.37 crore during the block period made by the assessee, Rs.11 crore during the survey and Rs.26 crore during the block period. Even otherwise also, the Assessing Officer, we noted, has gathered the information of unaccounted assets and unaccounted jewellery out of the documents found during the course of search which shows the utilization of the amount which the assessee has received by way of withdrawal from the bank account of the group concern as well as from the bank account of the sub-contractor which cannot be regarded to be undisclosed. We, therefore, do not agree with the reasoning of the CIT(A) in adopting the net profit @16% of the gross receipts. In our opinion, no addition on account of unaccounted assets to the extent of Rs.26 crores and unaccounted jewellery of Rs.2.37 crores could be made. We, therefore, after considering the facts of the case, past history, relevant case laws and nature of the activities carried on by the assessee, are of the view that the estimation of the income by the CIT(A) is at a higher side and is not justified. Therefore, we set aside the order of CIT(A) to the extent of directing the Assessing Officer to estimate the net profit @16% of the gross receipts and direct the Assessing Officer to estimate the net profit on the gross receipt @12% as has been estimated and returned by the assessee group in their respective returns filed in response to the notice issued u/s 153A and u/s 139 of the Income Tax Act."



6. Respectfully following the said decision, we set aside the order of the CIT(A) to the extent of directing the AO to estimate the net profit at the rate of 16% of the gross receipt and direct the AO to estimate the net profit on the gross receipts at the rate of 12% as has been estimated and returned in the return filed.

7. Now there remains ground nos. 5 and 6 for our adjudication.

8. We heard the rival submission carefully considered the same alongwith the orders of the tax authorities below. We noted that the only issue involved in these grounds is enhancement of the income by the CIT(A) to the tune of Rs. 2838869/-. This income has been enhanced due to the fact that CIT(A) has given the direction to the AO to estimate the income by applying net profit rate of 16% on the contract receipt by the assessee. The income in this manner came to Rs. 7938869/-. The AO has estimated the income from the contract activities at Rs. 5100000/- therefore, the income of the assessee has been enhanced by the amount of Rs. 2838869/-. We noted that during the impugned Assessment Year, the assessee has shown the contract income of Rs. 5100000 Lakhs. The Ld. AR before us has taken the plea that the facts involved and the issue involved in the case of the assessee is identical to the issue involved in the case of Mitesh Bhangdiya. This Tribunal in the preceding paragraph in the case of Mitesh Bhangdiya has directed the AO to estimate the net profit of the assessee at the rate of 12% of the gross receipt, therefore, we accordingly, direct the AO to assess the income from contract activities at Rs. 5954152/- in the case of the assessee i.e. 12% of the contract receipt amounting to Rs. 49617934/- therefore, the income enhanced by the CIT(A) got reduced to Rs. 854152/- from Rs. 2838869/- thus, these grounds are partly allowed.

9. The last ground in assessee's appeal relates to the charging of interest u/s 234A, 234B and 234C. Learned counsel for the assessee was fair enough to concede that these grounds are consequential in nature. We, therefore, direct the Assessing Officer that the interest chargeable u/s 234A, 234B and 234C be recomputed after giving effect to this order. Thus, this ground is allowed for statistical purposes in all the appeals.

10. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 30.06.2017

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(P.K. BANSAL)
VICE PRESIDENT

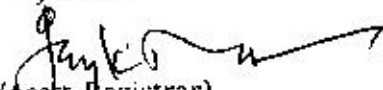
Nagpur
Date: 30th June, 2017

R. Dhoke, P.S.

Copy to:-

- 1) The Appellant;
- 2) The Respondent;
- 3) The CIT(A);
- 4) The CIT, Nagpur City Concerned;
- 5) The DR, ITAT, Nagpur;
- 6) ~~Guard File~~



By Order

(Ds / Asstt Registrar)
I.T.A.T., Nagpur
Assistant Registrar
Income Tax Appellate Tribunal
Nagpur Bench