

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE HON'BLE RAJPAL YADAV, VICE PRESIDENT
AND
HON'BLE MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.359 & 284/Ind/2017

&

ITANo.819/Ind/2018

Assessment Year 2009-10, 2012-13 & 2012-13

Ferro Concrete Con. India Pvt. Ltd.

3/5/7-B, Bhagirathpura,

Indore

PAN :AAACF2726K

: Appellant

V/s

DCIT-(Circle)-1(1)

Indore

: Respondent

ITANo.439/Ind/2017

Assessment Year 2009-10

DCIT-(Circle)-1(1)

Indore

: Appellant

V/s

Ferro Concrete Con. India Pvt. Ltd.

3/5/7-B, Bhagirathpura,

Indore

PAN : AAACF2726K

: Respondent

Assessee by	Shri C.P. Rawka, & Venus Rawka, CAs
Revenue by	Shri Rajib Jain, Sr. DR
Date of Hearing	05.07.2021
Date of Pronouncement	13.10.2021

ORDER

PER MANISH BORAD, A.M

The above captioned appeals filed at the instance of the Assessee and Cross Appeal by the revenue for Assessment Years 2009-10 & 2012-13 are directed against the orders of Ld. Commissioner of Income Tax(Appeals-II)/CIT (in short 'Ld. CIT(A)/CIT], Indore dated 01.03.2017, 20.3.2017, 31.07.2018 & 01.03.2017, respectively, which are arising out of the assessment orders u/s 143(3) of the Income Tax Act 1961 (In short the 'Act') dated 28.03.2015, 05.11.2014, 27.12.2017, 28.3.2015, respectively, framed by the concerned Assessing Officer(s).

2. The assessee has raised the following grounds of appeal in ITA No.359/Ind/2017:

“That the Ld. CIT(A) erred in law and facts of the case and confirmed the addition made by the Assessing Officer up to an extent of Rs.71,12,000/- by treating the same as commission earned by the assessee, in spite of the fact that said receipts were duly accounted for in books of accounts

and income was already assessee on said receipts.

2. That without prejudice to ground no.1 Ld. CIT(A) failed to consider addition already made in regular assessment on account of Net Profit at Rs.37,25,962/- which ought to have been deducted/reduced to the income estimated on the transaction.

Whereas the Revenue has raised following grounds of appeal in ITANo.439/Ind/2017:

“i. Whether on facts and in the circumstances of the case Ld. CIT(A) has erred in law by restricting the addition of Rs.7,12,00,000/- to Rs.71,12,000/- made by the Assessing Officer on account of unexplained money ignoring the facts of the case that the assessee has channelized its unaccounted cash through accommodation entries.

ii. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law by ignoring the facts of the case and restricting the addition of Rs.7,12,00,000/- to Rs.71,12,000/- made by the Assessing Officer on account of unexplained money u/s 69A of the IT act 1961.

3. Further, the assessee has also filed the following application for admission of additional ground for the assessment year 2009-10:

*“BEFORE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
IN THE MATTER OF
M/S FERRO CONCRETE CONST. [INDIA] PVT. LTD.
V/S
DCIT 1[1], INDORE (M.P.)
ASSESSMENT YEAR 2009-10*

PAN No.- AAACF2726K

The Appellant Company submitted return of income declaring income of Rs. 1,48,83,190/- on 28/09/2009 and regular assessment was completed on a total income at Rs. 1,81,09,152/- vide order dated 19/12/2011 u/s 143(3) by JCIT Range-(4), Indore.

That the notice u/s 148 dated 04/03/15 and in compliance thereof, return was submitted and reasons for reopening was requested to DCIT Circle-1(1), Indore (M.P.).

The Ld. AO supplied the reasons for reopening the assessment on 27/05/2015 and objections thereof were filed on 03/06/15 and same were disposed off by Assessing Officer vide order dated 21/12/15 and same were available at page 9 to 11 of the paper book. The Ld AO completed the re-assessment by additions of Rs 7,12,00,000/- to the income originally assessed.

The Assessee Company submitted an appeal before CIT(A)-II, Indore and Ld. CIT(A) vide order dated 13/02/2017 and granted the partial relief to the Assessee.

That while filing the appeal, no specific ground was raised against re-opening of the assessment and legality of assessment was questioned under ground no. 1 & 2 before CIT(A)- II, Indore.

That detailed submissions were made on the legality of re-opened assessment and Ld. CIT(A) while deciding the appeal , no comments made. The written submissions made are at Page no. 2 to 5 of paper book Part- II.

That aggrieved with the order Assessee preferred an appeal before ITAT and inadvertently the ground specifically for re-opening of the assessment could not be raised. It is therefore most humbly prayed that the following additional ground being legal ground arising out of the facts available on record may very kindly be admitted.

Additional Ground

That on the facts and circumstances of the case and under law Ld. AO erred in re-opening the assessment already completed u/s 143(3) of Act. The reopening of assessment completed u/s 143(3) is illegal and bad in law and same therefore deserves to be quashed.”

4. Through the above addl. ground, the assessee has challenged the reassessment proceeding. In support of the admission of addl. ground, the learned Counsel for the assessee submitted that the addl. ground is legal in nature and the same was also raised before the ld. CIT(A). Further, reliance was placed on the judgment of Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT (1992) 229 ITR 383*, judgment of Hon'ble jurisdictional High Court in the case of *CIT vs. Eicher Motors Ltd. (2007) 293 ITR 464* as well as in the case of *DCIT vs. Turquoise Investment & Finance Ltd. (2008) 299 ITR 143 (MP)*. On the other hand, the ld. CIT-DR opposed the request for admission of addl. ground but could not controvert the submission of the assessee by bringing any contrary material on record.

5. Considering the above facts and considering the decisions of Hon'ble Apex Court and Hon'ble Jurisdictional High Court (supra), we admit the addl. ground for hearing. Since addl. ground is legal in nature and goes to the root of the matter, we shall decide it at first.

6. Facts, in brief, are that the assessee is a Pvt. Ltd. company deriving income from contract work. It filed its return of income

for A.Y. 2009-10 on 28.09.2009 declaring total income of Rs. 1,43,83,190/-. The case was then selected for scrutiny and notices were issued which were duly complied. Finally the assessment u/s 143(3) was completed vide order dated 19.12.2011 thereby making addition of Rs. 37,25,962/- on account of low net profit and deemed dividend u/s 2(22)(e) and hence assessing total income at Rs. 1,81,09,150/-. Thereafter, an order u/s 154 was passed on 26.12.2012 on the question of depreciation resulting into determination of total income of the assessee at Rs. 1,86,21,994/-. Thereafter, on 04.03.2015, the case was reopened by issuing notice u/s 148 and vide AO's letter dated 27.05.2015, reasons for reopening the case were provided to the assessee. In response, the assessee filed its objections on 03.06.2015 which were disposed of by the AO through an order dated 21.12.2015. Further a query letter u/s 142(1) dated 04.01.2016 was issued to the assessee, against which, reply was submitted vide letter dated 25.01.2016. The only basis of reopening was the copy of assessee's ledger account in the books of one M/s Ketti Construction Ltd. found during search at the latter's premises. Ld. AO observed that there were cash payments made by the assessee to Ketti Const. Ltd. during A.Y. 2009-10

amounting to Rs. 7,12,00,000/- in totality. Therefore, he added same u/s 69A.

7. Being aggrieved, in appellate proceedings, the assessee filed detailed submission challenging the reopening u/s 147 before the ld. CIT(A) as also reproduced by the ld. CIT(A) in impugned order. Still, the ld. CIT(A) did not comment upon the same and did not decide the issue of reopening. Now, the assessee has challenged the same before this Tribunal through this addl. legal ground.

8. Before us, learned Counsel for the assessee submitted that the reopening of the case by the Ld. AO is bad in law as the assessee had already given all the disclosures and information during original assessment proceedings and Assessing Officer did not find anything warranting reassessment. Further, it is mandatory that the opinion should be that of the assessing officer for forming belief whereas in the instant case, the Assessing Officer has relied upon the information received from the DCIT-Central for which he himself was not sure on the question of authenticity. Learned Counsel for the assessee also submitted that in the reasons recorded by Ld. AO there were nowhere mentioned the words "Income chargeable to tax" which are of utmost importance so far as the Section 147 is concerned.

Further, the learned Counsel for the assessee submitted that the Ld. AO has mentioned about section 40A(3) in the reasons of reopening, however, the AO deviated from his aforesaid stand which he basically took while reopening the case and later on while framing the assessment, he added the said amount u/s 69A. Thus, the Assessing Officer was not sure since beginning that the transaction involved is of what nature, which section is attracted here and what kind of violation is there. Ld. AO has absolutely changed his view which was formed initially and which was formed while concluding the assessment. Therefore, the statutory provisions per 'reasons' and contents in 'assessment order' are distinct which shows that the reasons were not on account of application of mind on the part of AO. Thus it is a clear case of lack of basic ingredient of section 147 i.e. "reason to believe", as AO himself was not able to decide about the legal provisions which are being attracted in the given case. Per contra, ld. CIT-DR relied upon the orders of the Revenue Authorities and submitted that the reopening was rightly initiated by the Assessing Officer as the copy of assessee's ledger account in the books of one M/s Ketti Construction Ltd. was found during search at the latter's premises and the Ld. AO

observed that there were cash payments made by the assessee to Ketti Const. Ltd. during A.Y. 2009-10 amounting to Rs. 7,12,00,000/- in totality. Thus, the Assessing Officer had rightly reopened the assessment u/s 147 of the I.T. Act.

9. We have considered the rival submissions of both the parties and gone through the material available on the file. We find that the assessment u/s 143(3) was completed vide order dated 19.12.2011 thereby making addition of Rs. 37,25,962/- on account of low net profit and deemed dividend u/s 2(22)(e) and hence assessing total income at Rs. 1,81,09,150/-. Thereafter, an order u/s 154 was passed on 26.12.2012 on the question of depreciation resulting into determination of total income of the assessee at Rs. 1,86,21,994/-. Thereafter, on 04.03.2015, the case was reopened by issuing notice u/s 148 and reasons for reopening the case were provided to the assessee. In response to which the assessee filed its objections on 03.06.2015 which were disposed of by the AO through an order dated 21.12.2015. We find that the Assessing Officer has recorded the following reasons:

“As per information received from Dy. CIT(Central), Indore, it appears that payment to the tune of Rs.7,12,00,000/- was given to M/s. Ferro Concrete Construction (I) Ltd. by M/s.

Keti Construction Ltd. between 16.2.2009 to 31.3.2009. M/s. Keti Construction Ltd. has received same amount in cash from M/s. Ferro Concrete Construction (I) Ltd. M/s. Ferro Concrete Construction (I) Ltd. has booked bogus expenses against cash return back to Keti Construction Ltd. Further the applicability of Section 40A(3) is also attracted in the case of M/s. Ferro Concrete Construction (I) Ltd. to the extent of cash payment of M/s. Keti Construction Ltd.

I have therefore reason to believe that income of Rs.7,12,00,000/- has escaped the assessment and the assessee has failed to disclose full and true material facts for assessment within the meaning of Section 147.

In order to bring the escaped assessment under the tax net, issued notice u/s 148 of I.T. Act, 1961. The notice u/s 148 is being issued after taking prior approval from competent authority u/s 151.”

10. We find that the only basis of reopening was the copy of assessee's ledger account in the books of one M/s Ketti Construction Ltd. found during search at the latter's premises and the ld. AO observed that there were cash payments made by the assessee to Ketti Const. Ltd. during A.Y. 2009-10 amounting to Rs. 7,12,00,000/- in totality, thus, the Assessing Officer added the same u/s 69A. We find that the first proviso to section 147 of the Income Tax Act, 1961 reads as follows:-

“Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.”

From the above, we find that the reassessment can be done only where AO has reasons to believe that any income chargeable to tax has escaped assessment and there was a failure on the part of assessee to make full and true disclosure. However, in the instant case, the assessee had already given all the disclosures and information during original assessment proceedings and Assessing Officer did not find anything warranting reassessment. He has simply relied upon information received from DCIT-Central, Indore. Therefore, the AO has overlooked the first proviso to section 147 as at no point of time he has brought on record anything to the effect that there is any omission or failure on the part of assessee to disclose fully and truly all material facts necessary for assessment. We find that in the reasons, the Ld. Assessing Officer nowhere mentioned the words "Income chargeable to tax" which are of utmost importance as is evident from the Section 147 which speaks that *"If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess*

such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned.” Thus, the words “Income chargeable to tax” are of prime importance to the section 147. However, it can be seen from the reasons as reproduced above that the Assessing Officer did not mention the words “Income chargeable to tax” in the reasons which is unjustified rendering the reopening without jurisdiction. This view is supported by the decision of Hon’ble Delhi High Court rendered in case of UNITECH LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX, (2017) 99 CCH 0141 DelHC : (2017) 397 ITR 0547 (Delhi) wherein the Hon’ble High Court held as under:

“Reassessment—Non-disclosure of material facts—Issue of notice of reassessment—Validity—Petitioner-assessee sought for quashing of notice of reassessment issued u/s 148—Petitioner claimed that, reasons recorded by AO did not satisfy requirement of law in terms of sections 147/148 and there was no failure by Petitioner to disclose fully and truly all material facts necessary for assessment and neither was such failure recorded in reasons—Held, there was full disclosure by Assessee of all material facts relating to exempt income—It could not be said that condition for reopening of assessment was satisfied on this count—Nature of business of Petitioner had always been known

to Revenue year after year—Even in this reason there was not even whisper of failure by Petitioner to make full and true disclosure of all material facts necessary for assessment—Impugned notice did not satisfy rigors of sections 147/148 of the Act as there had been no non-disclosure of material facts by Petitioner—In fact, even reasons accompanying impugned notice did not even say that there was any failure by Petitioner to disclose fully and truly all material facts—Impugned notice quashed—Petition allowed.

Conclusion :

Where contents of the notice do not even say that there was any failure by the assessee to disclose fully and truly all the material facts, the notice did not satisfy the rigors of sections 147/148 and is liable to be quashed.

11. In case of HCL TECHNOLOGIES LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX & ANR, (2017) 99 CCH 0124 DelHC : (2017) 397 ITR 0469 (Delhi), the Hon'ble Delhi High Court held as under:

Reassessment—Income escaping assessment—Failure to make full and true disclosure of income and facts—Petitioner-Assessee challenged notice issued by AO u/s 148 seeking to re-open assessment for Assessment Year ('AY') 2003-04 as well as order passed by AO dismissing objections filed by Petitioner—AO passed reassessment order on ground that, Assessee failed to make full and true disclosure of income—Held, AO had not made effort of disclosing, in reasons, what according to him constituted failure by Assessee to make full and true disclosure—Mere reproduction of language of provision would not suffice—Also, although making such averment either in order rejecting objections of Assessee or subsequently in counter-affidavit in answer to writ petition would not satisfy requirement of law—For complying with jurisdictional requirement under first proviso to section 147, reasons would have to show in what manner Assessee had failed to make full and true disclosure of all material facts necessary for assessment—Burden was still on AO notwithstanding Explanation 1 to first proviso to Section 147—

There was no indication by AO in reasons for re-opening about failure, if any, by Assessee to make full and true disclosure of any material facts—Reason for re-opening also, therefore, was based not on any tangible material but on mere change of opinion—No failure by Assessee to make true and full disclosure—Impugned notice quashed—Petition allowed.

Held :

The AO has not made the effort of disclosing, in the reasons, what according to him constituted the failure by the Assessee to make a full and true disclosure. A mere reproduction of the language of the provision will not suffice. Also, although making such an averment either in the order rejecting the objections of the Assessee or subsequently in the counter-affidavit in the answer to a writ petition will not satisfy the requirement of the law. The reasons will have to speak for themselves. For complying with the jurisdictional requirement under the first proviso to Section 147 of the Act, the reasons would have to show in what manner the Assessee had failed to make a full and true disclosure of all the material facts necessary for the assessment. The failure to do so would not be a mere irregularity. It would render the reopening of the assessment after four years vulnerable to invalidation.

Conclusion :

Where there was no indication by AO in reasons for re-opening about failure, if any, by Assessee to make full and true disclosure of any material facts, reassessment order could not be sustained.

12. Further, we find that it is mandatory that the opinion should be that of assessing officer for forming belief whereas in the instant case, he has relied upon the information received from the DCIT-Central for which he himself was not sure on the question of authenticity as perceived from the word “it appears” noted in the reasons u/s 148(2) wherein in the first line, the AO wrote that “it appears that payments to the tune of Rs.

7,12,00,000/- was given to M/s Ferro Concrete Const. (I) Pvt. Ltd. to M/s Keti Constructions Ltd.”. Thus, these words show that AO was not having “reason to believe”, rather he has reopened the case on mere “suspicion”. This view is supported by the decision of Hon'ble Supreme Court rendered in case of ITO vs. Lakhmani Mewal Das 1976 CTR (SC) 220 : (1976) 103 ITR 437 (SC) : TC51R.598 wherein Lakhmani Mewal Das vs. ITO (1975) 99 ITR 296 (Cal)(FB) : TC51R.606 was affirmed. The Hon'ble Supreme Court observed as under:

"The powers of the ITO to reopen assessment, though wide, are not plenary. The words of the statute are 'reason to believe' and not 'reason to suspect'. The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken, the requirements of the law should be satisfied. The live-link or close nexus which should be there between the material before the ITO in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment."

13. From above, we are of the view that the main component of reasons should be AO having reason to believe. The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. Therefore, the Court can examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Assessing Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid. This ratio has been laid down by the Hon'ble Supreme Court in the case of *Ganga Saran & Sons (P) Ltd. vs. ITO & Ors.* (1981) 22 CTR (SC) 112 : (1981) 130 ITR 1 (SC) : TC51R.639 reversing the decision of

the Calcutta High Court in ITO vs. Ganga Saran & Sons (P) Ltd. (1981) 22 CTR (SC) 112 : (1981) 130 ITR 1 (SC) : TC51R.639]. The Hon'ble Supreme Court observed that "Having reason to believe" means that not only there is a reason for the belief but also that the belief is entertained or formed. Having reason to believe means that there is a reason coupled with the belief. Further, Hon'ble Delhi High Court in case of Sabharwal Properties Industries Pvt. Ltd. & Ors. Vs. Income Tax Officer & Ors., (2016) 95 CCH 046 (Del), observed that reasons recorded for reopening assessment should state that Assessee had failed to disclose fully and truly all material facts necessary for his assessment in returns as originally filed and reasons recorded should provide live link to formation of belief that income has escaped assessment. Thus where reasons recorded by AO "lack clarity and it was practically impossible to derive meaning out of it and was incapable of being understood", reassessment notice was liable to be quashed.

14. We also find that the Ld. AO mentioned about section 40A(3) in the reasons of reopening and opined that the said transaction of Rs. 7.12 crores attracts the violation of section

40A(3). However, we find that the AO deviated from his aforesaid stand which he basically took while reopening the case and later on while framing the assessment he added the said amount u/s 69A. Thus, from this action of AO, it is concluded that he was not sure in himself since beginning that the transaction involved is of what nature, which section is attracted here and what kind of violation is there. Therefore, the Ld. AO has absolutely changed his view which was formed initially and which was formed while concluding the assessment. Therefore, the statutory provisions per 'reasons' and contents in 'assessment order' are distinct which shows that the reasons were not on account of application of mind on the part of AO. Thus it is a clear case of lack of basic ingredient of section 147 i.e. "reason to believe", as AO himself was not able to decide about the legal provisions which are being attracted in the given case.

15. On consideration of above facts and discussion thereof in the light of the judicial pronouncements (supra), we are of the view that the reassessment proceedings were initiated under suspicion as narrated above, therefore, the proceedings u/s 147 is bad in law for want of jurisdiction in the light of first proviso to

section 147 and in the absence of cogent reasons to form belief that the assessee's income had escaped assessment and also in the light of the fact that the AO deviated from his stand by changing his view which was formed initially and which was formed while concluding the assessment as he was not sure in himself since beginning that the transaction involved is of what nature, which section is attracted here and what kind of violation is there. Thus, the reassessment proceedings are bad in law and accordingly, we quash the present assessment order for the assessment year 2009-10 being void and invalid. Thus, the additional ground raised by the assessee is allowed. Consequently, since the reassessment proceedings itself is quashed, the appeal filed by the assessee for the assessment year 2009-10 stands allowed and that of Revenue for the assessment year 2009-10 stands dismissed.

16. So far as the merits of the matter are concerned, we are of the view that since the reassessment proceedings itself has been quashed as above, we are refraining ourselves to make detailed discussion on merits. On consideration of material available on record and rival submissions on merits of the case, we find that

there is no case of assessing the income as there was no material evidencing movement of cash. Further, principle of natural justice was badly ignored by accepting version of third party without affording opportunity for cross examine. We also find that Section 40A(3) applies for payment otherwise than account payee cheque or bank draft against expenses and in the instant case, we find that no goods or service were provided by M/s Keti Construction Ltd. against which payment warranting action under section 40A(3) would be required. We find that the primary onus as regard to movement of cash, as alleged was on M/s Keti Construction Ltd. Therefore, it had bearing in the assessment in the case of above named person. It has not been brought on record either in the reasons under section 148(2) or during the assessment proceedings at any stage as to what action has been taken in the case of M/s Keti Construction Ltd. We find that on the strength of information received from the DCIT-Central Indore; the Assessing Officer alleged that the assessee had received a payment of Rs.7,12,00,000/- which had been paid back in cash by the assessee to M/s Ketti Construction Ltd. However, we find that during the original assessment framed u/s 143(3), the bank statement of the assessee was examined by the

AO very minutely. It clearly reflected receipt from M/s Ketti Construction Ltd. which was on account of sub contract awarded by M/s Ketti Construction Ltd. to the assessee. The corresponding receipt was duly recorded in the profit and loss account of the assessee, thus there is no deny on the issue of payment received. The theory advanced by the Ld. Assessing Officer of payment back to M/s Ketti Construction Ltd. by cash is based on some document recovered from M/s Ketti Construction Ltd. Therefore, M/s Ketti Construction Ltd. alone could be answerable on the content of the said paper. Even if the Ld. Assessing Officer relied upon the said document and wished to use it against the assessee, he was duty bound to follow the principle of natural justice and allow an opportunity to the assessee to cross examine directors of the M/s Ketti Construction Ltd. Further, we find that section 69A deals on the question of money etc. found to be in the ownership of the assessee and such money is not recorded in the books of accounts. However, in the instant case, there is no evidence that the assessee was found to be the owner of any money during the subject year. There is no other tangible material on records which shows that assessee was actually indulged into any such transaction and the

authenticity of copy of ledger account of assessee in the books of Ketu Construction Ltd. was also doubted by the assessee. We also find that the AO has discussed about the statement of one Shri Kedarmal Jakhetiya, director of Ketu Constructions Ltd. the ld. Assessing Officer placed reliance on the said statement where Mr. Jakhetiya has submitted a list of certain bogus petty contractors in which assessee's name was also included. However, we observe that during the entire assessment proceedings, neither the copy of the statement was provided to the assessee nor the said person was allowed to be confronted by the assessee. Ld. AO was duty bound to provide an opportunity to assessee to confront Mr. Jakhetiya regarding the same. But AO did not follow the principle of natural justice. Thus in such a situation, the discussion made by AO about the statement of director of said company is invalid in view of the violation of principle of natural justice. This view is supported by the ratio laid down in the cases of PRINCIPAL COMMISSIONER OF INCOME TAX vs. PARADISE INLAND SHIPPING P. LTD (2017) 98 CCH 0438 MumHC : (2018) 400 ITR 0439 (Bom), ANDAMAN TIMBER INDUSTRIES vs. COMMISSIONER OF CENTRAL EXCISE (2015) 94 CCH 0187 ISCC : (2015) 281 CTR 0241 (SC) : (2015) 127 DTR 0241 (SC).

Further, we find that the ld. CIT(A) noted that the assessee had received this amount of Rs.7,12,00,000/- by cheque from M/s Keti Construction Ltd. under the garb of sub contract payments and it was paid back to M/s Keti Construction Ltd. by cash and the Ld. CIT(A) deleted the addition to the tune of Rs.6,40,88,000/- on the ground that this sum of Rs.7,12,00,000/- has already been offered by the assessee for taxation as sub contract receipts and confirmed the addition of Rs. Rs.71,12,000/- on presumption estimating the commission @10%. However, we are of the view that when ld. CIT(A) himself noted the fact that the sum of Rs.7,12,00,000/- has already been offered by the assessee for taxation as sub contract receipts still ld. CIT(A) failed to appreciate the fact that the said receipts were duly accounted for in the books of account and income was already assessed on said receipts. We find that during regular assessment, the Assessing Officer noted that the total turnover during the assessment year 2009-10 was Rs.32,98,40,875/-. It includes the sum of Rs.7,12,00,000/- in question before us and the Assessing Officer applied n.p. rate of 1% higher than disclosed making an addition of Rs.32,98,409/- on account of low net profit. Thus, the addition was

already included in regular assessment on account of low n.p. at Rs.32,98,409/-. Accordingly, we do not find any merit in confirming the addition on estimation basis by the ld. CIT(A). Therefore, in view of the facts narrated above in the light of the judicial pronouncements (supra), we are of the view that the addition of Rs.71,12,000/- restricted by the ld. CIT(A) also deserves to be deleted. Therefore, even on merits of the case, the Revenue has no case. Accordingly, on merits too, the appeal filed by the assessee for the assessment year 2009-10 stands allowed and that of Revenue for the assessment year 2009-10 is dismissed.

17. So far as the remaining appeals i.e. ITA No.284/Ind/2017 and ITA No.819/Ind/2018 for the assessment year 2012-13 are concerned, the ld. Counsel for the assessee has filed an application to the effect that the assessee has opted for “Vivad Se Vishwas Scheme” and the Revenue department has issued Form No.5, therefore, the assessee seeks permission to withdraw both these appeals. On the other hand, ld. CIT-DR did not oppose the request. In view of these facts, we dismiss both

these appeals as withdrawn on account of “Vivad Se Vishwas Scheme”.

18. Finally, assessee’s appeal bearing ITA No.359/Ind/2017 (A.Y. 2009-10) is allowed and that of Revenue bearing ITA No.439/Ind/2017 (A.Y. 2009-10) is dismissed, whereas assessee’s appeals bearing ITA No.284/Ind/2017 and ITA No.819/Ind/2018 for the assessment year 2012-13 are dismissed as withdrawn on account of “Vivad Se Vishwas Scheme”.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 13.10.2021.

Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 13.10.2021
!vyas!

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore