

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4125 /M/2018
Assessment Year: 2007-08
&
ITA No.4126 /M/2018
Assessment Year: 2009-10**

Office of the ACIT 24(3), Room No.413, 4 th Floor, Piramal Chambers, Lalbaug, Parel, Mumbai – 400 012	Vs.	Shri Mohd. Nisar Yunus Sheikh, B-301, Baba Sadan, Ratan Nagar, Four Bungalows, Andheri (W), Mumbai – 400 053 PAN: AAOPS7537G
(Appellant)		(Respondent)

**CO No.101/M/2021
(Arising out of ITA No.4125/M/2018)
Assessment Year: 2007-08
&
CO No.102/M/2021
(Arising out of ITA No.4126/M/2018)
Assessment Year: 2009-10**

Mohd. Nisar Yunus Sheikh, B-301, Baba Sadan, Ratan Nagar, Four Bungalows, Andheri (W), Mumbai – 400 053 PAN: AAOPS7537G	Vs.	Office of the ACIT 24(3), Room No.413, 4 th Floor, Piramal Chambers, Lalbaug, Parel, Mumbai – 400 012
(Appellant)		(Respondent)

Present for:

Assessee by
Revenue by

: Shri Gyaneshwer Kataram, A.R.
: Ms. Neha Thakur, D.R.

Date of Hearing : 03.01.2022
Date of Pronouncement : 25.02.2022

O R D E R

Per Kuldip Singh, Judicial Member:

The aforesaid appeals filed by the appellant ACIT 24(3), Mumbai (hereinafter referred to as 'the Revenue') and cross objections filed by the objector Mohd. Nisar Yunus Sheikh (hereinafter referred to as 'the assessee') bearing common question of law and facts are being disposed of by way of composite order for the sake of brevity.

2. The Revenue and the assessee by filing present appeals and cross objections sought to set aside the impugned order dated 12.03.2018 passed by Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] on the grounds inter alia that:-

ITA No.4125/M/2018

***“1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing Rs.39,62,008/- on account of short deduction of contract receipts, being difference in the receipts as per Form 26AS and that offered in Profit & Loss Account, although assessee could not produce the requisite documents to corroborate his claim that there were recoveries made by the contractees against the payments made by them during the assessment proceedings.*”**

2. The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the AO be restored.

3. The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary."

ITA No.4126/M/2018

"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing Rs.1,51,50,726/- on account of short deduction of contract receipts, being difference in the receipts as per Form 26AS and that offered in Profit & Loss Account, although assessee could not produce the requisite documents to corroborate his claim that there were recoveries made by the contractees against payments made by them during the assessment proceedings.

2. Whether on the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) erred in allowing assessee's claim of double deduction of TDS of Rs.1,28,36,502/- which was neither discussed in assessment proceedings nor in remand proceedings.

3. The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the AO be restored.

4. The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary."

CO No.101/M/2021

"1. In the circumstances and facts of our case and in law, the learned Assessing Officer has erred in reopening the assessment u/s. 148 on the basis of Audit Objections which reopening is void-ab-intio, unwarranted and unlawful and against the decision of the law of the land i.e. Supreme Court decision in the case of Indian & Eastern Newspaper Society Vs. CIT (1979) 119 ITR 996 (SC), in case of Assistant Commissioner of Income-tax vs. FIS Global

Business Solutions India (P.) Ltd. (SLP no 4174 of 2019, dated 25/02/2019) ([2020] 104 taxmann.com 169 (SC) and in case of Larsen & Toubro Ltd. v. State of Jharkhand Civil Appeal No. 5390 of 2007 Dt. 21/03/2017 (SC).

2. The Respondent Assessee craves leave to amend or alter any grounds of cross objection or to submit additional new grounds of cross objection which may be necessary.”

CO No.102/M/2021

“1. In the circumstances and facts of our case and in law, the learned Assessing Officer has erred in reopening the assessment u/s. 148 on the basis of Audit Objections which reopening is void-ab-intio, unwarranted and unlawful and against the decision of the law of the land i.e. Supreme Court decision in the case of Indian & Eastern Newspaper Society Vs. CIT (1979) 119ITR 996 (SC), in case of Assistant Commissioner of Income-tax vs. FIS Global Business Solutions India (P.) Ltd. (SLP no 4174 of 2019, dated 25/02/2019) ([2020] 104 taxmann.com 169 (SC) and in case of Larsen & Toubro Ltd. v. State of Jharkhand Civil Appeal No. 5390 of 2007 Dt. 21/03/2017 (SC).

2. In the circumstances and facts of our case and in law, the learned Assessing Officer has erred in taking the ground on alleged double deduction of TDS of Rs.1,28,36,502/- instead of the double reflection of contract receipts of Rs.1,28,36,502/- in Form 16A issued by MCGM. Remand Report was sought from the Assessing Officer and the Assessing Officer failed to offer any comment on the same. Having accepted the contention of the Assessee in the remand report, the Assessing Officer has gone beyond his powers in raising this ground of appeal. The Assessee has already explained the said matter on merits and which has been allowed by the CIT(A) in his order dated 12/03/2018. This ground taken by the Assessing Officer is already covered in ground no. 1 and therefore the said ground taken by the Assessing Officer is a duplication.

3. The Respondent Assessee craves leave to amend or alter any grounds of cross objection or to submit additional new grounds of cross objection which may be necessary.”

3. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee is into the business of executing civil work for various government and private agencies and is adopting mercantile method of accounting. The return filed by the assessee declaring income of Rs.55,84,431/- was subjected to scrutiny. Originally assessment was framed by the Assessing Officer (AO) at the total income of Rs.61,18,420/- and Rs.1,92,01,090/- for A.Y. 2007-08 and A.Y. 2009-10 respectively. Thereafter, reopening was initiated under section 147 and 148 of the Act. The AO noticed discrepancy between the income received as per TDS certificate in form 16A and the income offered in income and expenditure account as contract receipt during A.Y. 2007-08 and 2009-10 as under:

Discrepancy noticed by the AO in A.Y. 2007-08

Assessment Year 2007-08		
Contract receipt as per Form 16A (Rs.)	Contract receipt offered in Income & Expenditure A/c. (Rs.)	Short offered (Rs.)
1) M.C.G.M. (04/2006 TO 03/2007)		
47837776		
1554408		
3916245		
6091926		
59400355	55438347	3962008

Discrepancy noticed by the AO in A.Y. 2009-10

Assessment Year 2009-10		
Contract receipts as per Form 16A (Rs.)	Contact receipt offered in income & Expenditure A/c (Rs.)	Short Offered (Rs.)
1)M.C.G.M (FY 04/2008 to 03/2009)		
94180434		
109413346		
3011359		
Total	206608140	192432923
2) Supreme Infrastructure India Ltd.	1365629	580098
1945727		
3) Goan Real Estate & Const. P. Ltd.	4142813	
1367182		
& Goa Medical College 500000	10904576	
2886882		
3618941		
7069795		
Total	15442800	15047389
Grand Total (1+2+3)	208845941	15150726
223996667		

4. Since the assessee has failed to reconcile the difference of contract receipt and TDS certificate claimed as per return of income the short offer of receipt to the tune of Rs.39,62,008/- and

Rs.1,51,50,726/- for A.Y. 2007-08 and 2009-10 respectively and consequently made addition thereof to the total income of the assessee and thereby framed assessment under section 143(3) read with section 147 of the Act for A.Y. 2007-08 and 2009-10.

5. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the appeal. Feeling aggrieved Revenue as well as assessee filed the present appeal as well as cross objections against the impugned order passed by the Ld. CIT(A).

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Ground No.1 of A.Y. 2007-08 and ground No.1 of A.Y. 2009-10:

7. Both the identical grounds are qua allowing the short deduction of Rs.39,62,008/- and Rs.1,51,50,726/- by the Ld. CIT(A) for A.Y. 2007-08 & 2009-10 respectively. Undisputedly, the assessee has not provided any detail to the AO during assessment proceedings. However, it is also admitted fact that

during appellate proceedings before the Ld. CIT(A), the assessee filed additional evidence which was sent to the AO for examination who has filed the remand report. The Ld. CIT(A) decided the issue in controversy qua short deduction of contract receipt, noticed by the AO being the difference in the receipt as per form 26AS and in the profit & loss account by returning following findings:

“4.1. In ground No.1 the appellant has challenged that the Ld. AO has erred in making audition of Rs.39,62,008/- on account of short declaration of contract receipts and levied tax on the same. The appellant is the proprietor of M/s. My Associates a firm engaged in the business of executing civil work for govt. and private agencies. The appellant filed the return of income on 31.10.2007, declaring taxable income of Rs.55,84,431/-. The assessment was completed u/s 143(3) of the Act on 30.10.2009 determining total income at Rs.61,18,420/-. Subsequently, the provisions of section 147 were invoked and assessment was completed u/s 143(3) r.w.s.147. AO passed the order u/s. u/s 143(3) r.w.s.147 of the Income Tax Act, 1961 by making addition on account of short offer of receipts amounting to Rs.39,62,008/-.

4.2. The current issue in hand is regarding the addition on account of difference in the receipts offered as per form 26AS and as per profit & loss a/c.

4.3 The assessee has submitted additional evidence in the form of confirmatory letters and duly certified billing charts and confirmations from the contractors to support the fact that the additions made by the Assessing Officer is incorrect since the retention money is offered in subsequent years and was that MCGM had deducted monies on account of their supplying other services which were deducted from the payments made to the assessee and that only after deduction of these expenses, was the payment made to the assessee. In respect of retention monies deducted by the MCGM, it was stated by the assessee that he has accounted the receipt of retention monies as when

received in accordance with the method of accounting i.e. cash method followed till asst year 2008-2009 and on receivable method from asst year 2009-2010. The assessee has in fact has accounted the retention monies on receivable basis in asst year 2009-2010 and even accounted the retention monies of the earlier years as and when received.

4.4 This additional evidence was sent to the Assessing Officer for his comments. The Assessing Officer has submitted the report vide letter dtd 13.12.2016. The Assessing Officer has only commented on the retention monies deducted by the contractees at the time of payment made to the assessee.

4.5 I have gone through the additional evidence and I admit the same and have satisfied myself in respect of the expenses incurred by the MCGM on account of the assessee in relation to interest on mobilization, recovery, debris removal, non-testing charges, excavation charges, the same cannot be added to the total income since if the said amount is added as contract receipts, there would be a consequent deduction of these expenses in the profit and loss account and therefore would have been no effect on the income of the assessee. The amount of expenses incurred by MCGM is Rs.10,92,714/-, In view of these expenses incurred by the MCGM been certified in certificate and letter, the addition on account of expenses in the nature of interest on mobilization, recovery, debris removal, non-testing charges, excavation charges amounting to Rs.10,92,714/- is deleted. In respect of addition of Rs.28,69,294/- for deduction on account of retention money by MCGM, the assessee has declared the income in subsequent years. In view of the said amount is declared -subsequent years the addition of Rs.28,69,294/- is deleted.”

8. Perusal of the aforesaid findings returned by the Ld. CIT(A) are identical in both the assessment years i.e. A.Y. 2007-08 & 2009-10 except for the difference in amount of addition. On the

basis of additional evidence also examined by the AO, the Ld. CIT(A) reached the conclusion that the expenses incurred by the MCGM on account of assessee qua interest on mobilization, recovery, debris removal, non testing charges, excavation charges are not liable to be added to the total income. The Ld. CIT(A) has identified the expenses incurred by MCGM to the tune of Rs.12,90,714/- for A.Y. 2007-08. The Ld. CIT(A) has also noticed that there is a double reporting made by MCGM of Rs.1,28,36,502/- in the form No.26AS and the MCGM has duly certified that TDS was deducted twice due to technical error of SAP system and as such textile amount was showing twice while filing the TDS return by MCGM for A.Y. 2009-10. Since it was a clear case of double reporting of the income by the contractee the Ld. CIT(A) has rightly deleted the amount of Rs.1,28,36,502/- for A.Y. 2009-10.

9. The Ld. CIT(A) also noticed the fact that since the expenses incurred by MCGM to the tune of Rs.10,92,714/- which is duly certified by MCGM and another amount of Rs.2869294/- for deduction on account of retention money by the MCGM which the assessee has declared as income in the subsequent years and as such the Ld. CIT(A) has rightly deleted the amount of Rs.10,92,714/-

and added Rs.28,69,294/- on account of non-testing charges excavation charges etc. by the MCGM and on account of retention money by the MCGM which the assessee has declared as income in the subsequent years respectively. So again finding no illegality or perversity in the impugned deletion ground Nos.1 of 7-8 and 1 of 9-10 are decided against the Revenue.

Ground No.2 of A.Y. 2009-10

10. The Ld. CIT(A) deleted the addition of Rs.1,28,36,502/- being the double deduction of TDS by returning following findings:

“4.6 In respect of the expenses incurred by the MCGM and contractees on account of the assessee in relation to interest on mobilization advance, water charges, recovery, sewerage chs, power, fuel, material supplied, etc the same cannot be added to the total income since if the said amount is added as contract receipts, there would be a consequent deduction of these expenses in the profit and loss account and therefore would have been no effect on the income of the assessee. The amount of expenses incurred by MCGM is Rs.13,38,715/-, by Supreme Infrastructure India Ltd is Rs.3,90,544/- and of Goan Real Estate & Contn. P. Ltd. is Rs 3,95,411/-. In view of these expenses incurred by the contractee been certified in their certificates and letter, the addition on account of expenses in the nature of interest on mobilization, recovery, water charges, sewerage charges, power, fuel, material supplied, etc amounting to Rs 21,24,670/- is deleted. In respect of addition of Rs.1,89,554/- of Supreme Infrastructure India Ltd, the Assessee has duly declared the income in Asst Yr 2008-09 and the said party has deducted TDS on payment basis. In view of the said amount is declared in Asst Yr 2008-09 the addition of Rs.1,89,554/- is deleted.”

11. Perusal of the aforesaid findings returned by the Ld. CIT(A) goes to prove that the expenses incurred by the MCGM on account of interest on mobilization advance, water charges, recovery etc. were earlier added to the total income which are not liable to be added because it would lead to the consequent deduction of these expenses in profit & loss account having no effect on the income of the assessee. Similarly, similar expenses incurred by MCGM, Supreme Infrastructure India Ltd. and Goan Real Estate & Contrn. P. Ltd. to the tune of Rs.13,38,715/-, Rs.3,90,544/- and Rs.3,95,411/- respectively have been duly certified and as such addition on account of expenses in the nature of interest on moibilisation, recovery, water charges etc. to the tune of Rs.21,24,670/- are not sustainable in the eyes of law. Similarly, addition of Rs.1,89,554/- qua Supreme Infrastructure India Ltd. the assessee has declared the same as income in A.Y. 2009-10 after deducting the TDS on payment basis and consequently deleted the addition of Rs.1,89,554/-. So again we find no illegality or perversity in the impugned findings which are based upon marshalling of facts as per books of accounts maintained by the assessee as well as contractee, hence ground No.2 of A.Y. 2009-10 is also decided against the Revenue.

12. In view of what has been discussed above, both the appeals filed by the Revenue for A.Y. 2007-08 and 2009-10 are dismissed. Cross objections filed by the assessee are also dismissed having not been pressed.

Order pronounced in the open court on 25th 02.2022.

**Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 25th 02.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.