IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, KOLKATA
[Before Shri A. T. Varkey, JM & Shri Girish Agrawal, AM]

I.T.A. No. 1368/Kol/2018
Assessment Year: 2013-14
&
I.T.A. No. 941/Kol/2019
Assessment Year: 2014-15

M/s. Anubhav Infrastructure Ltd. (PAN: AAFCA5482J)	Vs.	Principal Commissioner of Income-tax-Kolkata-5, Kolkata.
Appellant		Respondent

Date of Hearing (virtual)	01.02.2022
Date of Pronouncement	11.03.2022
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri Ghayas Uddin, CIT DR

ORDER

Per Shri A.T.Varkey, JM

These are two appeals preferred by the assessee against the separate orders of Ld. Pr. CIT-5, Kolkata dated 28.03.2018 for AY 2013-14 and dated 28.03.2019 for AY 2014-15 u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act"). Since there are certain common grounds involved in both appeals, it is agreed upon by both the sides that we take up the AY 2013-14 as the lead case.

2. At the outset, the Ld. AR Shri Miraj D. Shah assailing the action of the Ld. Pr. CIT invoking his revisional jurisdiction u/s. 263 of the Act contended that that it was done by the Ld. PCIT without fulfilling the essential condition precedent as laid down in section 263 of the Act i.e. *without validly finding that the order of the AO is erroneous in so far as prejudicial to the interest of the revenue.*

3. Brief facts leading to the impugned order is that the assessee had filed return of income for AY 2013-14 on 07.11.2013 showing total income of Rs. 76,31,840/-. Thereafter the case of the assessee was selected for scrutiny and vide order dated 30.03.2016 the original assessment was framed u/s 143(3) of the Act computing total

income at Rs. 96,23,935/- as against the returned income of Rs. 76,31,840/-. Later the Ld. PCIT-5, Kolkata issued two show cause notices (SCN) dated 22.02.2018 (refer page 59 of PB) and dated 23.03.2018 (Refer page 62 of PB) expressing his desire to exercise his revisional jurisdiction on three (3) issues which he found fault with the action of the AO as follows: i) Regarding non-deduction of tax at source in respect of payment to seven (7) parties named therein, ii) introduction of share capital and iii) non-disclosure of income from accommodation entries (sales and purchases). According to the Ld. PCIT since on these three (3) issues, the AO has not conducted proper enquiry/verification he was pleased to set aside the assessment order by passing the impugned order dated 28.03.2018 and directed the AO to frame the assessment taking into consideration the three issues as stated (supra). Aggrieved the assessee is before us raising the legal issue as to the jurisdiction of Ld PCIT to pass the impugned order.

4. Assailing the action of Ld PCIT and in order to buttress his contentions regarding the legal issue, the Ld. A.R drew our attention to page 59 of the paper book wherein the Ld. Pr. CIT's SCN dated 22.02.2018 has been found placed; and he drew our attention to the first issue which he found AO has erred while framing the assessment order u/s. 143(3) of the Act dated 30.03.2016. According to the contents of page 59 of Show Cause Notice (SCN), the Ld Pr CIT finds fault with the action of AO in not disallowing certain expenses because the assessee company has not *deducted tax at source* while making payments to seven (7) parties on account of expenses incurred by it which related to contracts/operations services etc. According to Ld. PCIT, the action of AO to allow the expenses as a deduction was wrong on the basis of certificate issued by the DCIT, Circle-59, Kolkata. In this regard, according to Ld. Pr. CIT, on a query in-respect of the certificate issued u/s 197 of the Act, the ACIT (TDS) Circle-3 has stated that *"as per the system generated report in ITD system, it is seen that no lower deduction certificate was issued as a deductor named M/s. Anubhav Infrastructure Ltd (assessee) in respect of these seven (7) parties through the system (ITD) for FY 2012-13."* Moreover according to Ld. Pr. CIT after 01.04.2010 the issue of manual certificate which was produced by the assessee to justify '*non-deduction of tax at source*' were not permitted and all certificates u/s. 197/206C have to be generated by the system. So according to Ld. Pr. CIT, the certificate u/s 197 of the Act produced before the AO during assessment proceedings to

justify non-deduction of tax at source was not valid, so according to Ld. Pr. CIT, the A.O. erred in allowing the claim of expenditure incurred by the seven (7) parties.

5. Thereafter, the Ld. A.R. drew our attention to the second and third issue which has been raised by the Ld. Pr. CIT by notice dated 22.03.2018 (refer page 62 of the Paper Book) wherein the Ld. PCIT states about two more issues : (1) introduction of share capital and (2) about accommodation entries. According to Ld. PCIT, the assessee company was providing accommodation entry to beneficiaries by giving them bogus billing which activity has been accepted/admitted by the assessee's own director Shri Dinesh Agarwal before the DDIT, Inv. in his statement u/s. 131 of the Act on 11.05.2016. According to Ld. Pr. CIT, even though the assessee company has shown sales and service of Rs.114,06,18,289/- and purchase of Rs.112,84,69,003/- however, the assessee company did not disclose in its return of income any commission income earned out of this business of providing bogus billing for purchase and sales which it has carried out in the FY 2012-13.

6. According to Ld AR, on the aforesaid three issues, the Ld. Pr. CIT intimated to the assessee his desire to exercise his revisional jurisdiction u/s. 263 of the Act. And pursuant to the receipt of aforesaid notices, the assessee replied (refer page 60 of PB) regarding the first issue i.e. allegation in respect of the deficiency in the certificates issued u/s. 197 of the Act which justified the assessee's action in not deducting tax at source while making payment to seven (7) parties. On this issue it was brought to the notice of the Ld. Pr. CIT that the AO during assessment proceeding had called for the certificates issued by the DCIT, Circle-59, Kolkata u/s 197 of the Act in respect of the seven parties named herein below and taking note that they had submitted the certificate u/s. 197 of the Act to the assessee; therefore, the assessee did not deduct any tax at source which fact after verification, the AO accepted the same and did not draw any adverse inference against the assessee on this score. The name of the seven parties to whom the assessee has made payments without deducting tax is given herein below along with page number in the paper book wherein copy of respective certificates pertaining to them had been placed which were issued by DCIT, Circle-59, Kolkata u/s. 197 of the Act as under;-

"a) Suryamukhi Projects Pvt. Ltd. dt. 30.04.2012 Page 40 of PB

b) Subhdristi Complex Pvt. Ltd. dt. 30.04.2012 Page 41 of PB
c) Subhshree Hirise Pvt. Ltd. dt. 02.05.2012 Page 42 of PB
d) Elegant Constructions dated 04.05.2012 Page 43 of PB
e) Argo Trade & Commerce dated 04.05.2012 Page 44 of PB
f) Wilson Projects dated 04.05.2012 Page 45 of PB
g) Rajshila Nirman Pvt. Ltd. dated 04.05.2012 Page 46 of PB"

7. The Ld. AR drew our attention to the contents of one of the certificates issued u/s 197 of the Act to one of deductees i.e. M/s. Suryamukhi Projects Pvt. Ltd. a copy of the same is reproduced as under:

Office of the Deputy Commissioner of Income-Tax, Circle-59, Kolkata,
10B, Middleton Row, 8th floor, Kolkata-700 071

No. D.C.I.T., Circle-59/TDS/197(1)/12-13/111 Dated: 30/04/2012

CERTIFICATE UNDER SECTION 197(1) OF THE IT ACT, 1961
(READ WITH SECTION 28AA OF THE INCOME TAX RULES, 1962)

NAME AND ADDRESS OF ASSESSEE:		SURYAMUKHI PROJECT PVT. LTD. 1A, GRANT LANE, KOLKATA – 700012
PAN	:	AAMCS5392J
Financial Year		2012 – 13
Assessing Officer's Circle/Ward		9(4)/KOL

In pursuance of Section 194C (Payment made on account of Contract/ Sub-contract), Section 194H (Payment made on account of commission/Brokerage) and Section 194J (Payment made on account for making payments towards Prof/Tech Services), the undersigned hereby authorize the Principal Officers of the parties responsible for making payments towards Contract, Commission/Brokerage and Technical Services, respectively to make payment after deducting of TDS @ 0% (at the rate of zero percent) at the time of payment or credit thereof.

The Certificate shall remain valid upto 31.03.2013 from the date of issue until it is cancelled or withdrawn by the undersigned with intimation to the deductee assesses.

(NICHOLAS MURMU)
D.C.I.T., Circle-59, Kolkata

8. According to Ld. AR, at the time of original assessment the AO taking note of the expenses incurred by the assessee and the payment made to the seven (7) parties (supra) asked the assessee reason for not deducting tax at source while making payments to them; and pursuant to which the assessee justified its action by bringing to the AO's notice the fact that deductees (7 parties) had produced certificates u/s 197 of the Act issued by the DCIT, Circle-59, which allowed the assessee from not deducting the tax at source. In order to verify this fact, the AO called for and examined the certificates issued u/s. 197 of the Act of all the seven (7) deductees/parties and finding the action of assessee (deductor) was as per law, the A.O. allowed the claim of expenses. Therefore, according to the Ld. AR, on this

issue the AO had enquired about it and being satisfied that the assessee did not deduct tax at source on the basis of the certificate issued by the DCIT, Circle-59, Kolkata u/s. 197 of the Act in respect of seven (7) parties named therein and after examining/verifying the certificates placed at page 40 to 46 (supra) has not preferred to draw any adverse inference against the assessee for non-deduction of tax at source, which action of the AO according to the Ld. AR cannot be held to be erroneous as well as prejudicial to the interest of the revenue. According to the Ld. AR, the Ld. Pr. CIT in order to find somehow fault with the certificates issued u/s 197 of the Act has observed that the department since 01.04.2010 issues only system generated certificate and not the manual certificate and therefore the certificates produced by the deductees are not valid. On this observation of Ld. PCIT, the Ld. A.R. submitted that it has to be appreciated that the assessee or the deductees (seven parties in this case) has no control whatsoever over the DCIT/competent authority who had issued the certificates u/s. 197 of the Act; and moreover they cannot dictate to these officials regarding which form of certificate need to be issued. Therefore, according to Ld. A.R. the action of the AO cannot be found fault with on this count. Moreover, according to the Ld. AR, the mistake in the action of the Ld. Pr. CIT is that the Ld. Pr. CIT misdirected himself by taking note of the contents of the reply of the ACIT (TDS) Circle-3 wherein he has stated that*"no lower deduction certificate was issued as a deductor named M/s. Anubhav Infrastructure Ltd (assessee) in respect of those seven parties through the system (ITD) for FY 2012-13".* According to the Ld. AR, on this answer to a query by the AO (TDS), the Ld. Pr. CIT has drawn an erroneous inference that the certificate issued by DCIT(TDS) to the seven parties placed at page 40-46 of PB are erroneous. However, according to the Ld. AR, as per section 197 of the Act, the certificate has to be issued by the AO (TDS) to the deductees i.e. in this case the seven (7) parties and not to the deductor (assessee in this case). Therefore, the reply given by the AO (TDS) that the assessee was not issued any lower deduction certificate as a deductor in respect of the seven parties (supra) through the system is a reply which is *ex-facie* misleading and confusing and so the Ld. Pr. CIT doubted the veracity of the certificates issued to the recipients of sum of money, on the basis of which the assessee has not deducted tax while giving them payment. Moreover, according to the Ld. AR, statute does not prescribe or differentiate or distinguishes in relation to manual/system generated certificate. Rather, according to Ld. AR, the certificate issued by

the DCIT, Circle 59 TDS can be seen to have been generated by computer only and not hand written/manual etc. Therefore, according to Ld. AR, the action of the Ld. Pr. CIT to find fault with the AO in allowing the expenses incurred by the assessee without deducting tax at source while making payment to the seven parties name therein is on misinterpretation/mis-reading of the reply given by the AO (TDS) and, therefore, this issue cannot be a ground for invocation of revisional jurisdiction u/s. 263 of the Act and, therefore, it has to be cancelled.

9. Coming to the next purported issue i.e. with regard to share capital introduced in this assessment year which the Ld. PCIT has alleged to have escaped notice of the AO while framing the assessment order dated 30.03.2016, the Ld. AR drew our attention to the reassessment order dated 02.11.2018 which was framed while giving effect to the impugned order of the Ld. Pr. CIT which is found placed at pages 65 to 73 of the Paper Book. According to the Ld. AR, a perusal of the same would reveal that the AO after enquiry has not drawn any adverse inference against the purported introduction of share capital and has not made any addition on this issue. Further according to the Ld AR, on this issue it has to be noticed that the assessee had issued bonus shares by capitalization of profits and reserves, and therefore, no sum of money was introduced into the assessee's capital as share capital in this AY 2013-14. Therefore, no adverse view was taken by the AO. Therefore, according to Ld AR, the issue in respect of the purported share capital is infructuous for the purpose of deciding this appeal.

10. Coming to the third issue i.e. with regard to the statement given by the director of the assessee company given to the department u/s 131 of the Act, (refer page 57 of paper book question no. 10) that they are into the business of providing accommodation entries to beneficiaries for commission. The Ld. AR fairly concedes that assessee is into the business of providing accommodation entries to beneficiaries in the form of bogus billing etc. in lieu of commission and referred to the question no. 10 and answer given by the assessee to buttress his claim, which is given below:

"Q.10. Please explain the modus of work done by you for these beneficiary companies.

Ans. Sir, we used to provide accommodation bills to the beneficiary companies through Professional fees, commission, sub-contracts, supplies, share capital unsecured loan and advances for the land

etc. Cheques/RTGS used to come in the HDFC Bank account of Anubhav Infrastructure Ltd. bearing a/c no.50200005592672 of Stephen House Branch from different parties/companies in lieu of bogus bills and we used to further sub contract it to the other parties/companies and hence it get returned to the beneficiary companies through cheques/RTGS."

11. According to the Ld. AR, on perusal of the reply it would clearly show that assessee provides accommodation bills to the beneficiary companies in the form of professional fees, commission, sub-contracts, supplies, share capital, unsecured loans and advances for the land etc. According to him, in respect to the bills raised by the assessee, cash is received in the assessee's account from different parties/companies/beneficiaries and assessee makes payment back to them through layering and finally the beneficiaries receives back their money through banking channel (cheque/RTGS). Thereafter he drew our attention to question no. 12 and 13 wherein assessee has accepted that it gets commission @ 0.25% of the cheque amount for providing accommodation entry. Therefore, according to the Ld. AR, since the assessee did not show the commission income in respect of its accommodation entry business, the same may be brought to tax. According to him, to that extent the Ld. Pr. CIT's order is in order and so it is valid. However, according to the Ld. AR, the Ld. Pr. CIT while finally giving direction to AO to erroneously take in to consideration two events for computation of commission (i) sales as well as (ii) the purchase, which direction the Ld. PCIT gave to AO while remanding the matter according to Ld AR is not correct. According to him, in the facts of this case, only sales bills(turnover) can be taken into consideration for consideration of the commission income ; and not the purchase turnover shown by the assessee because according to him, as per the *modus operandi* followed by the assessee, in lieu of money/cash coming to the assessee, it gives accommodation entries and returns the same back to the beneficiary by issuing cheques/RTGS for a commission; and in between the rotation of money is carried out through layering. And thus according to Ld. A.R., it can be seen that the assessee is not into any real business; and the accommodation entry is nothing but only fictitious transaction and, therefore, the direction of the Ld. Pr. CIT to bring into the tax incident the purported commission of assessee from purchase turnover to the tune of Rs.112,84,69,003/- is erroneous and only the commission in respect of providing sales & service (accommodation bills of turnover to the tune of Rs.114,06,18,289/-) can be brought to tax (commission income on it).

12. Per contra, the Ld. CIT, DR Md. Ghayas Uddin vehemently opposed the submissions of the Ld. AR and contended that the issue regarding validity/legal issue of exercise of revisional jurisdiction does not merit any consideration and, therefore, needs to be rejected. According to the Ld. CIT DR since there was no verification done at the time of assessment clause (a) of explanation (2) to section 263 of the Act would come into play in this case i.e. AO's order should be deemed to be erroneous in so far as prejudicial to the interest of the revenue since the AO has not made any enquiry or verification. According to the Ld. CIT, the AO in the original assessment has not enquired about the non-deduction of taxes while making payments/incurring expenses, and even if the AO has enquired, he has not conducted any verification at the time of assessment which led the AO to erroneously allow the expenditure purported to have been incurred by the assessee on the strength of invalid certificate not generated through system/computer. According to the Ld. DR, on an enquiry it was found that the AO (TDS) has not issued any system generated Section 197 certificate and the AO had allowed deduction of expenses incurred by assessee to the seven parties, which was erroneous. Therefore, according to Ld. D.R action of the AO is erroneous as well as prejudicial to the interest of the revenue. According to the Ld CIT DR, the other issue of share capital introduced by the assessee has also not been enquired by the AO, so the Ld Pr CIT validly exercised his jurisdiction u/s 263 of the Act. Coming to the accommodation entry part, he submitted that the assessee's director has already accepted/admitted that they are into the business of providing accommodation entry; and according to him both sales as well as purchase figures would generate commission to assessee; and therefore has to be taxed. So he does not want us to interfere with the impugned order of the Ld. PCIT.

13. We have heard rival submissions and carefully gone through the facts and circumstances of the case. Since we have to adjudicate the legal issue regarding the validity of exercise of revisional jurisdiction by Ld. PCIT u/s 263 of the Act, before we advert to the facts and law involved in this case before us, let us revisit the law governing the issue before us. The assessee as noted has challenged in the first place, the very usurpation of jurisdiction by ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act.

Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is existing in this case before the Pr. CIT has rightfully exercised his revisional power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him;[*because AO has to discharge dual role of an investigator as well as that of an adjudicator*]then in aforesaid any event the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*'' has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law".**

14. Tested on the touchstone of the aforesaid judicial precedent as laid down by the Hon'ble Supreme Court in the case of Malabar Industries (supra) in order to examine the

legal issue that has been raised by the assessee in this case, we note that for AY 2013-14 the assessee had filed return of income on 07.11.2013 showing total income of Rs. 76,31,840/-. Thereafter the case of the assessee was selected for scrutiny and vide order dated 30.03.2016 the original assessment was framed u/s 143(3) of the Act computing total income at Rs. 96,23,935/-. Later the Ld. PCIT-5, Kolkata issued two show cause notices (SCN) dated 22.02.2018 (refer page 59 of PB) and dated 23.03.2018 (Refer page 62 of PB) expressing his desire to exercise his revisional jurisdiction on three (3) issues which he found fault with the action of the AO as follows: i) Regarding non-deduction of tax at source in respect of payment to seven (7) parties named therein, ii) introduction of share capital and iii) non-disclosure of income from accommodation entries (sales and purchases). According to the Ld. PCIT since on these three (3) issues, the AO has not conducted proper enquiry/verification he was pleased to set aside the assessment order and directed to frame the assessment taking into consideration the three issues as stated supra and passed the impugned order dated 28.03.2018 as under:

> *"8. In view of the above and in absence of requisite enquiries by the AO on the issue of non-deduction of TDS and consequent disallowance under 40(a)(ia), (b) introduction capital, the assessment order passed on 30.03.2016 is erroneous and prejudicial to the interest of Revenue and, hence, set aside u/s 263 of the IT Act. The issue of absence of "Commission income" on accommodation entries which has come to light subsequent to the passing of the assessment order will also be examined by the AO while framing the set aside assessment."*

15. Aggrieved by the aforesaid action of the Ld. PCIT, the assessee has challenged the validity of his action u/s 263 of the Act and in finding fault with the action of AO on the aforesaid three (3) issues. Since according to assessee, the action of the AO to have framed assessment order dated 30.03.2016 cannot be held to be erroneous insofar as prejudicial to the interest of the revenue because the AO had discharged both his dual role of an investigator as well as that of an adjudicator.

16. Out of the three (3) issues raised by the Ld. PCIT in his impugned order, first of all we will take up the issue of introduction of capital which according to assessee was reflected in its financial due to issue of bonus shares and since there was capitalization of profit & reserve; and since no sum of money has been introduced as share capital in this assessment year, the AO while giving effect to the impugned order of Ld. PCIT has not drawn any adverse inference against the assessee on this issue which we find to be correct

on perusal of the re-assessment order dated 2.11.2018 passed u/s 143(3)/263 of the Act placed at page 65 to 73 of PB. Therefore this issue (introduction of share capital) has become infructuous for consideration of this appeal.

17. Coming to the next fault/issue of *non-deduction of tax* while making payment to seven (7) entities named (supra) on the strength of certificates issued to them u/s 197 of the Act found placed at page 40 to 46 of PB, was on the averments of AO(TDS) to a query that *"no lower deduction certificate u/s 197 were issued as a deductor named M/s Anubhav Infrastructure Ltd. (assessee) in respect of aforesaid parties".* Based on this averment, the Ld. PCIT doubted the genuineness of the certificate which are placed at page 40 to 46 of PB which on perusal are noted to be certificates issued by DCIT, Circle-59, Kolkata to each of the parties named therein u/s 197 of the Act. As per the aforesaid certificate issued u/s 197 of the Act, it is noted that the DCIT has authorized the principal officers who are responsible for making payments towards them (*to those seven (7) parties*) for various tasks *viz. contract, execution, payment of commission/brokerage and for rendering technical services* and directing them not to make any deduction of tax (0%) u/s 194C/194H and 194J while making payments to them or credit thereof. Thus we note that this are general certificate issued u/s 197(1) of the Act dated 30.04.2012 which is valid up to 31.03.2013 to all the principal officers/vendors [including assessee] not to deduct taxes while disbursing payment which otherwise they were bound to do u/s 194C/194H/194J of the Act. Here it is to be noted that certificate u/s 197(1) is issued to the deductee (*in this case, the seven (7) parties to whom certified u/s 197 was issued placed at page 40 to 46 of PB*) and it is not issued to the deductor i.e. assessee in this case. So the premise on which the Ld. Pr. CIT based his allegation (invalid section 197 certificate) flows from incorrect understanding of the elementary facts i.e. certificates u/s 197 is not issued to the deductor (assessee in this case). So, it is noted that Ld PCIT has misdirected himself by misconstruing the reply of AO (TDS) on this issue and erroneously thus found that the AO erred in allowing expenditure claimed to have been paid to the seven (7) parties. Further the ludicrous contention of the Ld. PCIT in order to find some fault in respect of the certificate that since 01.04.2010 certificate u/s 197 has to be generated through the system and so the certificates placed at page 40 to 46 of PB are invalid cannot be accepted as such because no where AO(TDS) has stated that certificate issued u/s 197 of the Act by DCIT, Circle-59 is fictitious/forged. The

simple averment of AO(TDS) is that certificate does not mention the name of assessee as the deductor in respect of these seven (7) parties. So the action of the AO during the original assessment proceedings to have allowed the expenditure claimed by the assessee for incurring expenditure with the seven (7) parties without making any deduction u/s 40(a)(ia) of the Act cannot be faulted in the absence of any adverse material/evidence and it should be borne in mind that nothing prevented the Ld. PCIT to call for report from DCIT, Circle-59, Kolkata about the veracity of the certificates placed at page 40 to 46 of PB and could have clearly given a finding of fact on it. But the Ld PCIT did not bother to do so, and as noted mis-read the reply of AO(TDS) to find fault with the certificates placed at page 40 to 46 of PB, which on the facts discussed cannot be countenanced. In the light of the aforesaid discussion we do not find any fault on the part of the AO in not making any disallowance u/s 40(a)(ia) of the Act because the assessee had produced the certificate u/s 197 in respect of seven (7) parties found placed at page 40 to 46 of PB. Therefore the Ld. PCIT's impugned order finding fault with the AO's action on this issue is found to be bad in law and therefore we cancel the order in respect of this issue.

18. Coming to the next issue i.e. income from the accommodation entry business of the assessee. The Ld. A.R. fairly accepted that since the director of the assessee company has admitted before the authorities u/s 131 of the Act that it is involved in providing accommodation entry through bogus billing he accepts that the income from accommodation entries since not being disclosed in the return of income filed by the assessee has been rightly found to be at fault with. Therefore the order of Ld. PCIT finding fault with the AO's action in not bringing to tax the income from accommodation entry is found to be in order. However the only grievance of the assessee/Ld. A.R. is in respect of the observation/direction of the Ld. PCIT in the impugned order that while computing the commission income of assessee from both sales as well as the purchase turnover need to be brought to tax which direction according to Ld. A.R. is untenable in the facts of this case. According to Ld. A.R, it is evident from the *modus operandi* of the assessee that it used to take cash from beneficiaries and thereafter issued back to them (beneficiaries), the sum of money in cheques/RTGS (through banking channel) through accommodation entries in lieu of commission of 0.25% through layering/rotation. Therefore the plea is that only the sales turnover commission ought to be brought to tax and not the purchase turnover. Since the

admitted position in this case as per the Ld. PCIT as well as that of the assessee is that assessee is into providing accommodation entries to the beneficiaries and the modus operandi has been explained by the assessee before the investigation wing as discernible from the question no. 10 & answer given by the assessee's director's father and which was the basis for Ld. PCIT to conclude that assessee is into accommodation entry business, we are of the opinion in the absence of any other material to prove that assessee was in receipt of commission from the purchase part of the transaction (albeit fictitious), so no commission be levied on this score. In the facts and circumstances of the case as discussed we direct the AO to bring to tax the commission earned by the assessee in respect of sales turnover to the tune of Rs. 114,06,18,289/-. With the aforesaid observation, the appeal of the assessee is partly allowed.

19. Coming to AY 2014-15 the Ld. A.R. drew our attention to the fact that there is only one (1) issue with regard to *non-deduction of tax* and other two (2) issues discussed supra in AY 2013-14 are not involved in this case. And coming to the only issue i.e. in respect of *non-deduction of tax* we note that in this assessment year (AY 2014-15) according to Ld. PCIT the assessee has incurred expenditure in respect of two companies (i) M/s Agro Trade and Commerce (hereinafter referred to M/s Agro) and (ii) M/s Elegant Construction (hereinafter referred to as M/s Elegant) and the AO erred in allowing deduction of the expenses, since assessee brought to the notice of the AO that both these companies (i.e. M/s Agro & M/s Elegant) were having in their possession certificate issued u/s 197 of the Act (refer page 35 & 36 of PB) issued by DCIT, Circle-59, Kolkata which we note pertains to AY 2013-14 & not this relevant AY 2014-15.

20. On a query from the Bench, the Ld. A.R. Shri Miraj first of all he accepted that on the strength of these certificate issued for AY 2013-14 that assessee had claimed deduction of expenses in this AY 2014-15. Justifying the action of AO in allowing the expenditure in AY 2014-15, on the strength of the certificate issued for AY 2013-14 u/s 197 of the Act, the Ld. A.R. draw our attention to page 1 of the PB-III wherein the extract of Section 194C of the Act has been reproduced which reads as under:

> *"194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work[39] (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified*

person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source—

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

(4) No individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [40][thirty] thousand rupees :"

21. A bare reading of the aforesaid section (Section 194C) it can be understood that the duty to deduct tax (TDS) on the payer/deductor (i.e. in this case the assessee) arises on the happening of two events i.e. (1) at the time of credit of such sum to the account of the contractor or (ii) at the time of payment thereof by the assessee. However it has to be taken note the important phrase used by the Parliament for determining when the duty to deduct tax arises on the payer/deductor (assessee in this case) is "*whichever is earlier*". So the intention of the Parliament is evident that the duty of deductor of tax while making the payment (assessee in this case) is triggered the moment whichever event as stated in Section 194C of the Act takes place first. So we have to see which event in this case took place first i.e. payment or credit in the books of the contractor. In order to prove that in this case, the assessee had made payments to contractor i.e. M/s Agro & M/s Elegant in AY 2013-14 i.e. earlier year which fact is evident from perusal of page 2 & 3 which is the ledger account of M/s Elegant in the books of the assessee; and the said expenses was debited in assessee's book in AY 2014-15 (Refer page 4 of PB). Likewise in case of M/s Agro, the ledger account is found placed at page 5 & 6 of PB, which shows that the assessee has made

payment to it in AY 2013-14 and only in this relevant assessment year i.e. AY 2014-15 debited the expenses in the assessee's book (refer page 6 of PB). Therefore since the payment to both the contractors (M/s Agro & M/s Elegant) took place earlier, the assessee was duty bound to deduct tax at source in the AY 2013-14 (earlier year). And the AO taking note of the fact that both these companies (M/s Agro & M/s Elegant) had been holding the certificate issued by the DCIT, Circle-59, Kolkata which is found placed at page 35 & 36 of PB allowed the expenditure incurred by the assessee, though the assessee claimed deduction in AY 2014-15, since the assessee debited the expenses in respect of both these companies in this relevant AY i.e AY 2014-15 (refer page 4 to 6 of PB), the action of AO cannot be faulted, because the provision (section 194C) of the Act casts a duty on the deductor to make the deduction on the happening of either of the events [*i.e. payment or credit in the books of the contractor*] happening at the first instance and in this case as seen & discussed, the payment took place first in AY 2013-14 & debit of expenses in assessee's book happened in AY 2014-15, so the action of assessee is as per Section 194C of the Act and the action of AO to allow the expenditure claimed by the assessee cannot be faulted, unless and otherwise, the aforesaid facts are found to be erroneous, which is not the case of Ld. PCIT. Therefore the action of Ld. PCIT to interdict the AO's action of allowing the deduction of expenses on the facts and circumstances discussed (supra) cannot be faulted which is a plausible view therefore the revisional jurisdiction does not lie for AY 2014-15. So the impugned order is quashed.

16. In the result, the appeal of the assessee for AY 2013-14 is partly allowed and the appeal of the assessee for AY 2014-15 is allowed.

Order is pronounced in the open court on 11th March, 2022.

Sd/- Sd/-

(Girish Agrawal) (Aby. T. Varkey)
Accountant Member Judicial Member

Dated: 11.03.2022

SB, Sr. PS

Copy of the order forwarded to:

1. Assessee – M/s Anubhav Infrastructure Ltd., 94, Andul Road, Vivekananda Nagar, Ananta Bhawan, 3rd Floor, Howrah-9.

2. Revenue – PCIT, Kolkata-5, Kolkata.
3. DCIT, Circle-13(1), Kolkata.
4. DR, ITAT, Kolkata, (sent through e-mail)..

True Copy By Order

Assistant Registrar
ITAT, Kolkata bench, Kolkata