

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.1817/Mum/2021  
(Assessment Year: 2016-17)**

**&**

**ITA No.1818/Mum/2021  
(Assessment Year: 2017-18)**

|   |     |   |
|---|-----|---|
| DCIT Central Circle-2(3)<br>Room No.803, 8 <sup>th</sup> Floor,<br>Prathistha Bhavan,<br>M.K. Road Churchgate,<br>Mumbai-400020 | Vs. | M/s. Soma Enterprises Ltd<br>8-2-623/5/1/1, Avenue-4,<br>Banjara Hills Hyderabad,<br>Telangana-500034 |
| <b>PAN/GIR No. AACCS8242F</b>   |     |   |
| <b>(Appellant)</b>  | ..  | <b>(Respondent)</b>   |

**CO No.47/Mum/2022  
(Arising out of ITA No.1817/Mum/2021)  
(Assessment Year :2016-17)**

**&**

**CO No.45/Mum/2022  
(Arising out of ITA No.1818/Mum/2021)  
(Assessment Year :2017-18)**

|   |     |   |
|---|-----|---|
| Soma Enterprises LTD<br>8-2-623/5/1/1, Avenue-<br>4, Banjara Hills<br>Hyderabad, Telangana-<br>500034 | Vs. | DCIT Central Circle-2(3)<br>Room No.803, 8 <sup>th</sup> Floor,<br>Prathistha Bhavan. M.K. Road<br>Churchgate,<br>Mumbai-400020 |
| <b>PAN/GIR No. AACCS8242F</b>   |     |   |
| <b>(Appellant)</b>  | ..  | <b>(Respondent)</b>   |

|                              |                                |
|------------------------------|--------------------------------|
| Assessee by                  | Shri. K. Gopal                 |
| Revenue by                   | Shri. Tejinder Pal Singh Anand |
| <b>Date of Hearing</b>       | <b>4/11/2022</b>               |
| <b>Date of Pronouncement</b> | <b>28/11/2022</b>              |
|                              |                                |

## **आदेश / ORDER**

### **PER BENCH:**

These appeals in ITA No. ITA No. 1817/Mum/2021 & CO No.45/Mum/2022, ITA No.1818/Mum/2021 & CO No.45/Mum/2022 for A.Y.2016-17, 2017-18 respectively arise out of the order by the Id. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal No.CIT(A)-48/107/DCCC-2(3)/2019-20 dated 23/07/2021 & 06/08/2021 respectively (Id. CIT(A) in short) against the order of assessment passed 153A r.w.s. 143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 19/06/2019 by the Id. Dy. Commissioner of Income-Tax, Central Circle-2(3), Mumbai (hereinafter referred to as Id. AO).

Identical issues involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

2. The revenue has raised the following grounds for the A.Y. 2016-17 :-

*1. Whether on the fact and circumstances of the case and law the Ld. CIT(A) has erred in deleting the addition of Rs. 14,94,28,253/-on account of non genuine payment to contractors/sub-contractors without appreciating the facts that these contracts are nothing but artificially arranged back to back subcontracts for inflating expenses in the books of assessee.*

*2. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing reduction of account of Share of profit of AOP from the book profit of assessee without appreciating the fact that such reduction of Share of profit of AOP from book profit is allowable to assessee only from A. Y. 2017-18 and therefore the same cannot be allowed retrospectively.*

3. The assessee has raised the following cross objections for the A.Y. 2016-17:-

1. *“The Ld. A.O. is erred in passing the assessment order dated 19.06.2019 under section 153A r.w.s 143(3) of the Act without having any incriminating material pursuant to the search and seizure actions under section 132 of the Act conducted against the assessee. Thus, the assessment order passed under section 153A r.w.s 143(3) of the Act is bad in law and the same may be quashed.*

2. *The Assessee craves leave to add, amend, alter delete any of the above grounds of appeal.”*

4. We have heard the rival submissions and perused the materials available on record. The assessee is engaged in the business of development of infrastructure projects in Highways, Irrigation, Hydel Power Sectors and Transportation Sectors. During the year under consideration, the assessee has shown income from business and income from capital gains. A search and seizure action u/s 132 of the Act was carried out on ABIL Group on 21/07/2017 wherein various residences of partners / directors of the group as well as business premises situated at Mumbai and Pune were covered. Shri Avinash Bhosale is the promoter and founder of ABIL group. The group is primarily engaged in infrastructure development, real estate development and hospitality industry. The assessee company was also covered in the above search action and accordingly the case of the assessee got centralised vide order passed u/s 127(2) of the Act by the Administrative Commissioner. Pursuant to the same, notice u/s 153A of the Act dated 13/04/2019 was issued and served on the assessee for the A.Y. 2016-17. In response to the said notice, the assessee filed return of income on 11/05/2019 declaring total income of Rs Nil. We find that as on date of search, the time limit for issuance of notice u/s 143(2) of the Act for the A.Y. 2016-17 itself had not expired. Hence it could be safely concluded that A.Y. 2016-

17 falls under the ambit of 'pending proceeding', which gets abated, pursuant to the search on 21/07/2017. In respect of abated assessments, the law is very well settled by the decision of Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645 (Bom) that there is no requirement of existence of any incriminating materials found during the course of search, in view of the fact that the provisions of section 153A of the Act contemplates determination of total income of the assessee only. While framing the search assessment, only in respect of unabated assessments, the Assessing Officer cannot disturb the earlier concluded assessments either u/s 143(1), 143(3) or 147 of the Act unless there is some incriminating material found during the search relatable to such concluded assessment year. In view of this settled legal position, the grounds raised by the assessee in its cross objections would be devoid of merits and hence dismissed for the A.Y. 2016-17.

4.1. In respect of A.Y. 2017-18, even the due date of filing the return of income u/s 139(1) of the Act had not expired as on the date of search on 21/07/2017 and accordingly the A.Y. 2017-18 becomes pending proceeding, which gets abated. Hence the same principle laid down hereinabove would apply with stronger and equal force for A.Y. 2017-18 also.

5. Hence the cross objections of the assessee for both the years before us are hereby dismissed.

6. The Id. AO observed that it was found during the search conducted on the assessee that it had made payments to various non-genuine purchase parties and sub contractors. According to Id. AO, the details related to that identified parties were seized and analysed during post

search enquiries and it was found that the identified parties were not genuine and that they only issued bills without supply of any material or the work done by sub contractors. The assessee, during the course of the assessment proceedings, was called upon to justify the transactions it carried on with the ABIL Infra Projects Ltd and Splendor Developers Pvt. Ltd (SDPL). This was called in view of the allegation that it was found from the seized materials that assessee had made payments to M/s. ABIL Infra projects Pvt. Ltd. and M/s. Splendor Developers Private Limited against the sub contract work of a project ( i.e construction of Tunnel from Gundovali to Bhandup Complex) ; that M/s. ABIL Infra Projects Pvt. Ltd and M/s. Splendor Developers Private Limited had sub contracted the same work to M/s. Maganti Construction, which is closely related entity of the assessee ; that both M/s ABIL Infra projects pvt Ltd and SDPL did not have the expertise to perform the contract work and that the entire work was carried out only by M/s Maganti Construction and accordingly M/s ABIL Infra Projects Pvt Ltd and SDPL had merely acted as a conduit for transferring the funds from the assessee to M/s Maganti Construction after retaining their respective margins ; that ultimately the work was carried out only by M/s Maganti Construction and accordingly why the sub contract work was awarded to SDPL and M/s ABIL Infra Projects Pvt Ltd and not to M/s Maganti Constructions directly.

6.1. The assessee submitted the details of year wise payments from assessee to M/s. ABIL Infra Projects Pvt. Ltd and M/s. Splendor Developers Private Limited and from these companies to M/s. Maganti Construction as below:-

| Financial Year | Soma Enterprises Limited to ABIL Intra projects Limited (A) | ABIL Infra projects Limited to M/s. Maganti Constructions (B) | C=(A)-(B)  | Soma Enterprises Limited to Splendor Developers Pvt. Ltd (D) | Splendor Developers Pvt. Ltd M/s. Maganti Construction (E) | F=(D)-(E) |
|----------------|---|---|------------|--|--|-----------|
| 2009-10        | 1600,00,000   |   | 160000000  |  |  |           |
| 2010-11        | 200000000   |   | 200000000  |  |  |           |
| 2011-12        | 208656678   | 178903558   | 29753120   |  |  |           |
| 2012-13        | 2045162976  | 1589831006  | 455331970  | 542178201  | 412144158  | 130034043 |
| 2013-14        | 874812933   | 679331716   | 195481217  | 94856390   | 72363035   | 22493355  |
| 2014-15        | 212403618   | 143749239   | 68654379   | 341072851  | 25953779   | 81535732  |
| 2015-16        | 235809059   | 160622537   | 75186522   | 313494222  | 239252491  | 7424173   |
| 2016-17        | 228561733   | 111959891   | 116601842  | 82937668   | 59006227   | 23931441  |
|                | 4165406997  | 2864397947  | 1301009050 | 1374539332   | 1042303030   | 332236302 |

6.2. The assessee also submitted a detailed reply explaining the purpose of making payments to M/s ABIL Infra Projects Pvt Ltd and M/s SDPL together with the commercial relationship of the assessee with those entities as under:-

*We submit that the above companies are promoted by Mr. Avinash N. Bhosle, who is holding 6% of equity in the assessee company. Earlier he was holding 13% and was also the joint managing director of the company. He resigned from the board during the year 2010 and thereafter his son Mr. Amit Avinash Bhosle took over the charge as director and he also left the company in the year 2013. Mr. Avinash Bhosle was the key and instrumental in the success and rapid growth of the company. He was associated with the company for almost 15 years. Because of his support & presence in the state of Maharashtra, our Company could lay a strong foundation in the state and bagged so many projects front the Government of Maharashtra. Being a localized and*

*experienced in the field, his presence lead to an immense help in the growth of the company.*

*Later, Mr. Avinash Bhosle set up his own companies and left the assessee company. This is out of this courtesy, the assessee company has given a sub-contract from project "Mumbai Water Supply Tunnel Project" awarded by Municipal Corporation of Greater Mumbai ('MCGM') to M/s. Ramu Real Estate Developers Limited (later name changed to ABIL). The volume of the work subcontracted was around Rs. 396 crores approx. and was spread over the period i.e., from asst. year 2012-13 to 2017-18. Similarly, another sub-contract was given to M/s. Splendor Developer Private Limited and the contract value was Rs. 150 Crores approximately and the same is spread over 5 (five) assessment years i.e., from 2013-14 to 2017-18. The transactions between both the parties us were properly documented and also filed before the DDIT (Inv.) and as well before your good selves. Both the above companies, in turn, have further sub-contracted the above works to M/s. Maganti Constructions ("Maganti"), which was a separate transaction not related to the assessee company. May be few of the directors of the assessee company are interested in Maganti do not make entire transaction a sham. All entire transactions were properly accounted in the books of accounts and the payments have been made after deducting tax at source."*

*The said project has been actually completed by the assessee company and the same has been certified by MCGM, a statutory corporation. **The recipient of contracts i.e. ABIL & SPLENDOR have also accounted for the receipts and admitted the same in the return of income and assessment must have been completed.** Incidentally, your goodselves is only the assessing officer for the said companies and it is understood that the revenue offered by the said companies have been accepted. Having accepted revenue in the hands of the recipient companies, it is very strange how can the said amount is alleged to be non-genuine in the hands of the assessee company who has claimed the same as an*

*expenditure. The basic fundamental principle i.e., income in one hand is the expenditure to the other, is conveniently ignored by your goodselves. In respect of engagement of subcontractors, we relied on the following evidences which were appreciated at the time of original assessment and also during the course of 153A proceedings:*

- a) Work orders some of which were seized in course of search*
- b) Measurement Books*
- c) Bills passed by the company*
- d) Ledger of copies of the subcontractors as appearing in our books*
- e) Copies of bank accounts*
- f) Confirmation from MCGM regarding completion of the project*

*The AO has not faulted any of the above evidences at the time of original assessment.*

6.3. The assessee was again asked to reconcile the figures of payments made to M/s ABIL Infra projects pvt ltd and M/s SDPL as per the seized material and as provided by Mr Vivek Nagarakar during the statement recorded u/s 132(4) of the Act with the amount of payments submitted by assessee. The assessee submitted the reconciliation of amounts paid with a note on discrepancy, which is reproduced as under:-

*The above work done details are including mobilization advance of Rs 16,00,00,000/- & Rs 20,00,00,000/- paid to ABIL on 19/02/2010 & 08/04/2010 respectively and which was recovered from the above gross bills raised by ABIL over a period of time and net of amount only paid. The copy of the statements showing the recovery of mobilization advance from gross bill amount, with copy of bills and bank statements are already submitted vide letter dated 27/05/2019.*

6.4. The Id. AO did not accept to the aforesaid contentions and submissions of the assessee and concluded that there is no justification for allowability of excess and inflated expenditures in the books of M/s. Soma Enterprises Limited on account of these artificially arranged back to

back subcontract transactions. Therefore, the excess or inflated expenditures attributable to the difference between the values of contract between- i) Soma Enterprises Limited and ABIL Group entities (M/s. ABIL Infra projects Limited & M/s. Splendor Developers Pvt. Ltd) and that between ii) ABIL Group entities and M/s. Maganti Constructions in respective years is disallowed as per the workings below-

| Work Done By |              | Total<br>(3=1+2) | Maganti<br>Work Done<br>4=(out of 1 &<br>2) | Difference<br>5=3-4 |
|--------------|--------------|------------------|---|---------------------|
| ABIL (1)     | Splendor (2) |                  |   |                     |
| 23,58,09,059 | 31,34,94,222 | 54,93,03,281     | 39,98,75,028                                | 14,94,28,253        |

6.5. The Id. CIT(A) reproduced the submissions of the assessee from pages 32 to 42 in para 7.11 of his order and appreciated the contentions of the assessee by deleting the addition made by the Id. AO. Aggrieved, the revenue is in appeal before us.

6.6. The Id. AR argued that sub-contracts were granted to the ABIL Infra Projects Pvt Ltd and Splendor Developers Pvt. Ltd. as the same were controlled by Mr. Avinash Bhosle. Mr. Avinash Bhosle is not a stranger to the assessee. He was participating in the business activity of the assessee as stake holder till 2010. He was instrumental in obtaining and executing several contracts, especially, in the state of Maharashtra. He was contemplating to start his ventures and which he did start. Thus, as a commercial proposition, it was mutually agreed to give the said companies a part of the "Mumbai Water Supply Tunnel Project" awarded

by Municipal Corporation of Greater Mumbai (MCGM). However, the same will be executed by another independent concern i.e. M/s. Maganti Constructions. This arrangement was mutually agreed by the parties to retain the interest and attention of Mr. Bhosle without losing control over the quality of the work while executing the same. The entire arrangement was driven by concerns of commercial expediency. The assessee has not awarded the sub-contracts to the said companies to bring down its taxable income. The arrangement was purely for the purposes of commercial considerations. The above contention of the assessee can be supported with the fact that the assessee is suffering operational losses year after year. The impugned year is no exception for that. The disallowance of Rs.14,94,28,253/- does not result into any positive taxable income. This contention is to substantiate that the transactions were bonafide and driven by commercial considerations. It may not be out of place to submit that the huge project known as "Mumbai Water Supply Tunnel Project" was completed in time and completion certificate was issued by MCGM. The Id.AR also pointed out that the assessee before the Id. AO had even drew the attention of the Id. AO that the sub-contracted entities i.e M/s ABIL Infra Projects Pvt Ltd and M/s SDPL were also assessed by the same AO and that their receipts from the assessee had been duly taxed as business income in their hands by the very same AO. The Id. AR pointed out that the arrangement entered into by the assessee with the said companies has not worked to the detriment of the revenue. The assessment order shows that the said companies have reported positive income. Thus, the arrangement with the said companies of the assessee was driven by commercial consideration.

6.7. The Id. DR vehemently relied on the order of the Id. AO and submitted that no works were executed by M/s ABIL Infra Projects Pvt Ltd and M/s SDPL and that the contract work was actually executed only by

M/s Maganti Constructions. Infact as and when the payments were made by assessee to M/s ABIL Infra Projects Pvt Ltd and M/s SDPL, back to back payments were made by those two entities to M/s Maganti Constructions pursuant to back to back contracts entered into by them with M/s Maganti Constructions. In this regard, the Bench posed a query as to under what head of income, the receipts from assessee were assessed by the same AO of M/s ABIL Infra Projects Pvt Ltd and M/s SDPL. In this regard, the Id. DR was directed to furnish the scrutiny assessment orders of M/s ABIL Infra Projects Pvt Ltd and M/s SDPL , which were duly submitted by the Id. DR in the next date of hearing vide letter of Id. AO dated 26/07/2022. In the said letter dated 26/07/2022, the following details were submitted by the Id. AO before us :-

a) Assessment Orders framed u/s 143(3) of the Act in the case of M/s ABIL Infra Projects Pvt Ltd and M/s Splendor Developers Pvt Ltd for the A.Ys. 2013-14 to 2018-19.

b) Ledger Copy of M/s Soma Enterprises Ltd appearing in the books of M/s ABIL Infra Projects Pvt Ltd and M/s Splendor Developers Pvt Ltd for the A.Ys. 2014-15 to 2018-19.

6.8. As stated above, the Id. DR submitted the letter written by the Id. AO (i.e ACIT, Central Circle 2(3), Mumbai) dated 26/07/2022 before us, wherein the Id. AO had mentioned that the amounts received by M/s ABIL Infra Projects Pvt Ltd and M/s SDPL from Soma Enterprises Ltd (assessee herein before us) had not been added as Business Income in the hands of the recipient companies. But we find that this statement made by the Id. AO in his letter dated 26/07/2022 is factually incorrect.

6.8.1. On perusal of the assessment order for the A.Y. 2016-17 in the case of M/s ABIL Infra Projects Pvt Ltd u/s 153A r.w.s. 143(3) of the Act dated 25/05/2019 , we find that the Id. AO (i.e. DCIT, Central Circle 2(3), Mumbai , being the same AO of the assessee herein) in para 3 of his order had observed as under:-

3. The assessee company is primarily engaged in the business of real estate development and sale. During the year under consideration assessee shown income from business or profession and income from other source. During the course of the assessment proceedings the assessee had filed relevant details and the same were placed on record. After going through the submission made by the assessee, following additions are made to the income of the assessee.

6.8.2. Ultimately in Para 9 of the assessment order of M/s ABIL Infra Projects Pvt Ltd, the AO had computed the total income as under:-

| S.N. | Particulars   | Amount (Rs.) | Amount (Rs.)       |
|------|---|--------------|--------------------|
| I    | Income from business and profession (As per return of income)   | 1,85,62,856  |                    |
| Add: | (i) Addition on account of disallowance u/s 14A (as per para-4) | 62,48,834    |                    |
|      | (ii) Disallowance of Helicopter expenses                        | 1,57,91,007  |                    |
|      | (iii) Disallowance of salary expense ( as per para-6)           | 9,00,000     |                    |
|      | (iv). Disallowance of foreign travel as per para— 7             | 8,49,695     |                    |
|      | (v).Disallowance of legal expenses as per para— 8               | 4,11, 091    | 4,27,63,483        |
| II   | Income from other sources(As per return of income)              |              | 50,849             |
|      | Gross Total Income  |              | <b>4,28,14,332</b> |
|      | Chapter VI-A deductions   |              | -                  |
|      | Less: u/s 80G - Donation  |              | 9,30,686           |
|      | Total Income  |              | <b>4,18,83,646</b> |
|      | Total Income <i>R/off</i>                                       |              | <b>4,18,83,650</b> |

Calculation tax under section 115JB  
Book Profit

Add/ LessRs. - Rs.(2,14,76,867)  
Deemed Income u/s 115JB Rs.(2,14,76,867)

6.8.3. On perusal of the assessment order for the A.Y. 2017-18 in the case of M/s ABIL Infra Projects Pvt Ltd u/s 153A r.w.s. 143(3) of the Act dated 25/05/2019 , we find that the Id. AO (i.e. DCIT, Central Circle 2(3), Mumbai, being the same AO of the assessee herein) in para 3 of his order had observed as under:-

*3. The assessee company is primarily engaged in the business of real estate development and sale. During the year under consideration assessee shown income from business or profession and income from other source. During the course of the assessment proceedings the assessee had filed relevant details and the same were placed on record. After going through the submission made by the assessee, following additions are made to the income of the assessee.*

6.8.4. Ultimately in Para 7 of the assessment order of M/s ABIL Infra Projects Pvt Ltd, the AO had computed the total income as under:-

| S.N. | Particulars   | Amount (Rs.) | Amount (Rs.) |
|------|---|--------------|--------------|
| I    | Income from business and profession (As per return of income)   | 1,45,52,316  |              |
| Add: | (i) Addition on account of disallowance u/s 14A (as per para-4) | 1,73,72,707  |              |
|      | (ii) Disallowance of Helicopter expenses (as per para 5)        | 1,36,88,767  |              |
|      | (iii) Disallowance of salary expense ( as per para-6)           | 9,00,000     | 4,65,13,790  |
| II   | Income from other source (as per return of income )             |              | 28,094       |
|      | Gross Total Income  |              | 4,65,41,884  |
|      | Chapter VI-A deductions   |              |              |
|      | Less: u/s 80G - Donation  |              | 3,00,000     |
|      | Total Income  |              | 4,62,41,884  |
|      | Total Income R/off  |              | 4,62,41,880  |

Calculation tax under section 115JB

Book Profit

Add/Less Rs.

Deemed Income u/s.115JB

Rs.(-66,29,504)

Rs.(-66,29,504)

6.8.5. On perusal of the assessment order for the A.Y. 2016-17 in the case of M/s Splendor Developers Pvt Ltd u/s 153A r.w.s. 143(3) of the Act dated 10/05/2019 , we find that the ld. AO (i.e. DCIT, Central Circle 2(3), Mumbai , being the same AO of the assessee herein) in para 5 of his order had computed the total income as under:-

| S.N. | Particulars  | Amount (Rs.) | Amount (Rs.)       |
|------|--|--------------|--------------------|
| I    | Income from profit/ gains of business/ profession (as per ROI) | 6,14,93,431  |                    |
|      | Add: Disallowance u/s 14A r.w.r.SD (para 4]                    | 5,87,013     | 6,20,80,444        |
|      | Gross Total Income   |              | 6,20,80,444        |
|      | Less: b/f business loss set-off                                |              | 5,28,04,916        |
|      | Total Income   |              | 92,75,528          |
|      | Total Income R/off   |              | 92,75,530          |
|      | <b>Deemed income of u/s 115JB</b>                              |              | <b>6,14,93,217</b> |

Tax on deemed income u/s 115JB being more than tax on income under normal provisions, the Income u/s 115JB is considered for tax computation purposes.

**The following business loss is wholly consumed during the year and no more losses are accumulated for carrying forward.**

| A.Y.    | B/f. business loss  | Set-off during current year | Balance carried forward |
|---------|---|-----------------------------|-------------------------|
| 2013-14 | 5,28,04,916 (as per latest assessment order of A.Y.2015-16) | 5,28,04,916                 | 0                       |

6.8.6. On perusal of the assessment order for the A.Y. 2017-18 in the case of M/s Splendor Developers Pvt Ltd u/s 153A r.w.s. 143(3) of the Act dated 10/05/2019 , we find that the ld. AO (i.e. DCIT, Central Circle 2(3),

Mumbai , being the same AO of the assessee herein) in para 7 of his order had computed the total income as under:-

| S.N. | Particulars  | Amount (Rs.) | Amount (Rs.) |
|------|--|--------------|--------------|
| I    | Income from profit / gains of business / profession (as per ROI) | 70,23,434    |              |
|      | Add: Disallowance u/s.14A r.w.r.8D (para 4)                      | 11,64,275    |              |
|      | Less: Interest on Income tax refund (para5)                      | 99,460       |              |
|      | Add: Disallowance of CSR Expenses (para 6)                       | 7,11,000     | 87,99,249    |
| II   | Income from other sources (as per ROI)                           | 0            |              |
|      | Add: Interest on income tax refund (para 5)                      | 99,460       | 99,460       |
|      | Total Income   |              | 88,98,710    |

6.8.7. From the perusal of the aforesaid assessment orders framed u/s 153A r.w.s 143(3) of the Act in the hands of the recipient companies (i.e ABIL Infra Projects Pvt Ltd and SDPL) by the very same AO, we find that the receipts from M/s Soma Enterprises Ltd (i.e. assessee before us) has been duly offered by them as income from business and the same has been assessed by the Id. AO only under the head 'income from business'. This goes to categorically prove that the contractors i.e M/s ABIL Infra Projects Pvt Ltd and M/s SDPL have indeed rendered services to the assessee for which the payments were made by the assessee and wherever they (i.e the two contractors) in turn had sub-contracted the work to M/s Maganti Constructions, the payments made by them to M/s Maganti Constructions have been accepted as genuine business expenditure in the hands of M/s ABIL Infra Projects Pvt Ltd and M/s SDPL by the very same AO. Nothing prevented the Id. AO from assessing the receipts from the assessee as income from other sources in the hands of the two recipient companies. Having assessed the receipts from the

assessee as business income in the hands of M/s ABIL Infra Projects Pvt Ltd and M/s SDPL, the Id. AO had actually accepted the fact that these two contractors had indeed rendered contract services to the assessee. Hence the very same AO taking a completely divergent stand by making totally baseless allegations against the assessee and deciding to disallow the contract payments made by the assessee herein is totally unsustainable in the eyes of law.

6.9. We find that the Id. CIT(A) had duly appreciated the contentions of the assessee and deleted the addition made by the Id. AO in this regard by observing as under:-

*“7.16 I have also examined the tax implication for the sub contract given to ABIL Infra project and Splendor. It appears that income received by ABIL and Splendor has been disclosed by them in the Income Tax return filed for respective years. While ABIL has disclosed income of Rs.87.51 crs. From A.Ys. 2012-13 to 2017-18 from the above transactions, Splendor has shown income of about Rs. 12 crs. They have also tax of Rs. 32.48 crs and 2.29 crs respectively in respect of these transactions. Besides, both these companies were assessed by the same A.O. So, if the Ld. A.O. felt that this income was liable to be taxed in hands of the assessee company then he should not tax the receipt in the hands of ABIL and Splendor for the respective years. Therefore, taxing the amount both in the hands of the assessee company on one hand and ABIL and Splendor on the other hand, this income has been taxed twice, which is not permissible under the law.*

*7.17 It is further noticed and no losses as such is caused to the Revenue by sub contract given to ABIL and Splendor. In fact, had this sub contract not been given to these concerns, valuable Revenue would have been lost and no taxes as such would have come to the Exchequer which is clear from the fact that even after adding these receipts in the hands of the assessee, there was only loss of Rs. 28.12 crs. For A.Y. 2015-16, loss of Rs. 37.37 crs. For A.Y. 2016-17 and Rs. 37.75 crs. For A.Y. 2017-18. Thus, no tax liability has arisen on account of making these additions in the hands of the assessee company. On the contrary, the assessee ended up getting refunds even after assessment. Therefore, I am inclined to accept the contentions of the assessee that no losses are caused to Revenue by subcontracting work.*

*7.18 In view of the foregoing discussions, I hold that no addition is warranted in the hands of the assessee on account of sub contract given*

*to ABIL and Splendor. Consequently, addition made by the A.O. is directed to be **deleted**. “*

6.10. Moreover, we find that the findings given by the Id. CIT(A) in para 7.17 of his order that even after disallowing the said contract payments in the hands of the assessee, the assessment had only resulted in loss in the hands of the assessee company and that the exchequer is benefitted out of these payments as the recipients had duly paid sufficient taxes to the Government. This finding has not been controverted by the revenue before us. Hence we hold that there is no need for the assessee to divert its profits by making payments to two contractors M/s ABIL Infra Projects Pvt Ltd and M/s SDPL with a malafide intention to reduce the profits. In any case, it is only loss even after the disallowance of the said payments in the hands of the assessee herein. This also goes to prove that the transactions of contract payments made by the assessee to M/s ABIL Infra Projects Pvt Ltd are genuine and cannot be treated as sham.

6.11. In view of the aforesaid observations, we do not find any infirmity in the order of the Id. CIT(A) granting relief to the assessee by deleting the disallowance made on account of contract payments in the sum of Rs 14,94,28,253/- . Accordingly, the Ground No.1 raised by the revenue for the A.Y. 2016-17 is hereby dismissed.

7. The Ground No. 2 raised by the revenue is challenging the action of the Id. CIT(A) by directing the Id. AO to allow the reduction of account of share of profit from AOP from the book profit u/s 115JB of the Act.

7.1. We have heard the rival submissions and perused the materials available on record. The assessee, during the previous year relevant to the impugned assessment year, has received Rs.3,30,36,759/- from an AOP as its share in the profits. The assessee, while computing the

income under the regular provisions of the Act, reduced the same from the total income as per the provisions of section 86 of the Act. The provisions of section 86 of the Act are reproduced hereunder for the sake of convenience: -

*“Where the assessee is a member of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India), income tax shall not be payable by the assessee in respect of his share in the income of the association or body computed in the manner provided in section 67A:*

***Provided that-***

- a) Where the association or body is chargeable to tax on its total income at the maximum marginal rate or any higher rate under any of the provisions of this Act, the share of a member computed as aforesaid shall not be included in his total income;*
- b) In any other case, the share of a member computed as aforesaid shall form part of his total income:*

***Provided further*** *that where no income tax is chargeable on the total income of the association or body, the share of a member computed as aforesaid shall be chargeable to tax as part of his total income and nothing contained in this section shall apply to the case.”*

7.2. The assessee, while computing the book profits for the purposes of section 115JB of the Act, did not include the same in the book profits on the ground that the same needs to be excluded while determining the book profits. The assessee contended that clause (fa) which provides that book profits, for the purposes of section 115JB, has to be increased by expenditure debited to the P&L Account which is relatable to income not chargeable to tax under section 86 of the Act and similarly clause (iic) provides for the exclusion of the profits. These clauses to Explanation 1 to section 115JB were inserted by Finance Act, 2015 with effect from 01/04/2016 and hence applicable to A.Y. 2016-17. In any case, the assessee also placed reliance on the decision of Mumbai Tribunal in the case of Goldberg Finance (P) Ltd vs ACIT reported in 78 taxmann.com

123 in support of its contentions that the said amendment in section 115JB of the Act should be construed as retrospective in operation.

7.3. The Id. AO observed that section 115JB of the Act defines the book profit in exhaustive manner. As per the section, the reduction of share of profit of AOP from book profit is only allowable from A.Y. 2017-18 ; that the said provision is not retrospective in nature, as submitted by assessee; that order of Mumbai Tribunal as mentioned by assessee was not accepted in principle by department. Accordingly, the Id. AO recomputed the book profit u/s 115JB of the Act by adding the share of profit of Rs.3.30.36.759/- from AOP. The Id. CIT(A) by following the decision of Mumbai Tribunal referred supra held that the amendment brought in Finance Act 2015 is clarificatory in nature and hence directed the Id.AO to reduce the share of profits from AOP while computing book profit u/s 115JB of the Act.

7.4. We find that the amendment in Section 115JB of the Act has been brought from Finance Act 2015 w.e.f. 01/04/2016. Hence this is applicable from A.Y. 2016-17 which is the year under dispute. Hence even as per the statute, the assessee is entitled for reducing the share of profits from AOP while computing book profit u/s 115JB of the Act. Hence even without placing reliance on the decision of Mumbai Tribunal referred supra, the assessee is entitled for relief. Hence the Ground No. 2 raised by the revenue for the A.Y. 2016-17 is hereby dismissed.

8. The revenue has raised the following grounds of appeal for the A.Y. 2017-18 before us :-

*1. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to examine the assessee's claim that bogus transactions of Rs. 4,28,32,332/- were undertaken in 4. Y. 2014-15 without appreciating that the assessee had actually made a payment of Rs. 4,28,32,332/- in A.Y. 2017-18 which has been acknowledged and accepted by the assessee in its own submission for the A.Y. 2017-18 and that this new claim is therefore merely an afterthought.*

*2. Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 14,05,03,283/- on account of non-genuine payment to contracts/sub contracts without appreciating the facts that these contracts are nothing but artificially arranged back to back sub-contracts for inflating expenses in the books of the assessee.*

9. The Ground No. 2 raised by the revenue for the A.Y. 2017-18 is identical to Ground No. 1 raised by the revenue for the A.Y. 2016-17. Hence the decision rendered by us hereinabove in Ground No. 1 for A.Y. 2016-17 shall apply mutatis mutandis for Ground No. 2 for A.Y. 2017-18 ,except with variance in figures. Accordingly, the Ground No. 2 raised by the revenue for the A.Y. 2017-18 is hereby dismissed.

10. The Ground No.1 raised by the revenue for the A.Y. 2017-18 is challenging the direction to the Id. AO to examine the assessee's claim that bogus transactions of Rs 4,28,32,332/- were undertaken in A.Y. 2014-15 for which actual payments were made only in A.Y. 2017-18.

10.1. We have heard the rival submissions and perused the materials available on record. The Id. A.O. has discussed this issue in the assessment order dated 19/06/2019 at pages 2 to 12 in paras 4.1 to 4.6. The issue in dispute is reflected in the chart at page 4. The item no 4 in the chart is Sadhana Corporation. The assessee, before the Id. CIT(A), contended that the amount of Rs.4,28,32,332/- disallowed is not an expenditure claimed as deduction in the impugned assessment year. This is an expenditure pertaining A.Y. 2014-15 and the same has been disallowed in the A.Y. 2014-15. During the previous year relevant to

impugned assessment year, the same has been internally assigned from one site of the assessee to another site. Thus, the disallowance is not justified. The Id. CIT(A) in this regard observed in his order in Para 7.6. as under:-

*“7.6. However, during the course of appellate proceedings, the assessee brought to my notice that expenditure in respect of Sadhana Corporation was not debited in the P & L account during the year but was actually debited in A.Y. 2014-15. The assessee in this regard has explained that an amount of Rs. 5.3 cr. in respect of Sadhana Corporation was debited in A.Y. 2014-15. The assessee in this regard explained that out of the above Rs. 5.3 cr an amount of Rs. 1,04,16,667/- was transferred to the site account SH-01 in A.Y. 2015-16 and remaining amount of Rs.4,28,32,332/- is transferred to the SH-01 particular site account four-six landing of Gujarat-Maharashtra Border, as reversal from job code SH-02, in A.Y. 2017-18. It has been explained by the assessee that no expenditure as such has been booked in A.Y. 2017-18 in this regard. If that be the case, this issue can only be examined in A.Y. 2014-15 and not in the current year. Consequently, the addition made by the A.O. in respect of first part amounting to Rs.13,26,879/- is upheld. Further the expenditure of Rs.4,28,32,332/- in respect of Sadhana Corporation may be examined in A.Y. 2014-15.”*

10.2. The Id.AR pleaded that no additional evidences were filed by the assessee before the Id. CIT(A). He also drew our attention to page no. 5 of the paper book filed before us containing the ledger account of M/s Sadhana Corporation as appearing in the books of the assessee company for the period 01/04/2016 to 31/03/2017 relevant to A.Y. 2017-18 wherein the transfer from one site to another site had happened is reflected. The same fact is also stated in the order of the Id.CIT(A) in para 7.6 reproduced supra. The main contention of the Id. AR is only that the disallowance made in A.Y. 2017-18 in the sum of Rs 4,28,32,332/- is already included in the figure of disallowance of Rs 5,36,45,833/- made in A.Y. 2014-15. This only requires factual verification. Hence we do not find any infirmity in the order of the Id. CIT(A) directing the Id. AO to examine the same in A.Y. 2014-15. Accordingly, the Ground No. 1 raised by the revenue for the A.Y. 2017-18 is hereby dismissed.

**11. In the result, the appeals of the revenue are dismissed and cross objections of the assessee are dismissed.**

Order pronounced on 28/11/2022 by way of proper mentioning in the notice board.

**Sd/-  
(RAHUL CHAUDHARY)  
JUDICIAL MEMBER**

**Sd/-  
(M.BALAGANESH)  
ACCOUNTANT MEMBER**

Mumbai; Dated 28/11/2022  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)  
**ITAT, Mumbai**