

ITA No. 40/GAU/2022
Assessment Year: 2013-2014
&
ITA No. 01/GAU/2023
Assessment Year: 2013-2014
ABCI Infrastructure Pvt. Limited

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-GUWAHATI 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 40/GAU/2022
Assessment Year: 2013-2014**

***ABCI Infrastructure Pvt. Limited,..... Appellant
6th Floor, Vasundhara,
2/7, Sarat Bose Road,
Bhowanipore, Kolkata-700020
[PAN:AACCM3317R]***

-Vs.-

***Assistant Commissioner of Income Tax,....Respondent
Circle-1, Guwahati,
Aayakar Bhawan, Christian Basti,
G.S.Road, Guwahati-781005, Assam***

-A N D-

**I.T.A. No. 01/GAU/2023
Assessment Year: 2013-2014**

***Deputy Commissioner of Income Tax,.....Appellant
Circle-1, Guwahati,
Aayakar Bhawan,
Room No. 507, 5th Floor,
Christian Basti,
G.S.Road, Guwahati-781005, Assam***

-Vs.-

***ABCI Infrastructure Pvt. Limited,.....Respondent
6th Floor, Vasundhara,
2/7, Sarat Bose Road,
Bhowanipore, Kolkata-700020
[PAN:AACCM3317R]***

Appearances by:

Shri S.K. Tulsian, Advocate, appeared on behalf of the assessee

Shri N.T. Sherpa, JCIT, appeared on behalf of the Revenue

Date of concluding the hearing : January 30, 2023

Date of pronouncing the order : April 3rd, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee and Revenue are in cross appeals before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals), Central, North-East Region, Guwahati dated 30.08.2022 passed for assessment year 2013-14.

2. Grounds of appeal taken by both the appellants read as under:-

Grounds of appeal by assessee:

(1) That on the facts and in the circumstances of the case, the Ld. C.I.T.(A) acted illegally in having upheld initiation of reassessment proceeding u/s. 147 by issue of a notice u/s. 148, in spite of the fact that none of conditions precedent existed and/or have been complied with and/or fulfilled by the Ld. A.O.

(2) That the Ld. CIT(A) was wholly wrong in not considering the fact that proceeding initiated u/s 147 of the IT Act, 1961 is completely bad in law' and without jurisdiction as it is a search and seizure case and in the impugned case proceeding could have been initiated only u/s 153 A of the IT Act, 1961.

(3) The Ld. CIT(A) erred in upholding the order of the Ld. A.O. as no evidence of escapement of income was found and there is no denying the fact that the impugned transaction was disclosed at the time of original assessment by the assessee while passing order u/s 143(3) of the IT Act, 1961 dated 31.03.2016, therefore as per the proviso (1) to 147 of the IT Act, 1961, the action of the Ld. A.O. in initiating the impugned proceeding is a mere change of opinion.

(4) That the Ld. CIT(A) erred in not appreciating the fact that no incriminating material was ever available against the assessee.

(5) That the Ld. CIT(A) estimated the net profit rate of 6% of the contract amount without any basis and is totally in contradiction to his own admission in his order that the assessee sub-contracted the impugned contract @ 3% of the total contract revenue.

(6) That the Ld. CIT(A) erred in upholding the assessment order passed by the Ld. A.O. as no evidence of escapement of income was found.

(7) That the Ld. CIT(A) erred in not appreciating the fact that the Ld. A.O. is talking of a statement which was recorded in 2014 whereas assessment order in the impugned case was framed u/s 143(3) of the Act, 1961 in 2016 and therefore the aforesaid statement cannot be considered a new information warranting the initiation of proceedings u/s 147 r.w.s. 148 of the IT Act, 1961.

(8) That the Ld. CIT(A) erred in not appreciating the fact that if any document is found or seized there is need for recording satisfaction by the Ld. A.O. of searched person and forwarding the said order to the Ld. A.O. of the concerned person which never happened in this case for initiating proceeding u/s 153C of the Act, 1961.

(9) That as the order of the Ld. A.O. is devoid of any merit, unwarranted, arbitrary and bad in law, the same should be quashed and your appellant be given such relief (s) as prayed for.

(10) That the appellant craves leave to amend, alter, modify, add to, abridge and/or rescind any or all of the above grounds in future.

Grounds of appeal by Revenue:-

(1) Ld. CIT(A) has erred by deleting the addition to the tune of Rs.66,40,68,972/- under the head of cost of material consumed by not taking considering the fact of the modus operandi of booking of bogus expense by beneficiaries including the assessee and re-routing of funds through paper/shell companies explained by Shri Sanjay Kumar Drolia, Director of M/s. Silverpoint Infratech Limited in his statement on oath u/s 131 dated 25.06.2014.

(2) The appellant craves the leave to add/modify/alter any or all the grounds during the course of hearing/pendency of appeal.

3. Before taking up the grounds of appeal stated above in seriatim, we deem it appropriate to note brief facts:-

The assessee is a Private Limited Company engaged in the business of civil construction and maintenance of roads, rails, bridges, tunnels, ports, harbours, runways etc. It has filed its return of income electronically on 22.09.2013 declaring total income at Rs.20,20,75,870/-. The case of the assessee was selected for scrutiny assessment under CASS and a notice under section 143(2) was issued and served upon the assessee. The ld. Assessing Officer has passed the assessment order on 30.03.2016 under section 143(3) of the Income Tax Act. The ld. Assessing Officer had determined the income of the assessee at Rs.21,21,04,560/-. It emerges out from the record that thereafter

the ld. Assessing Officer had issued notice under section 148 of the Income Tax Act and reopened the assessment. The re-assessment order was passed under section 147 read with section 143(3) on 18.12.2017 determining the taxable income of the assessee at Rs.21,92,45,159/-. In this re-assessment order, the ld. Assessing Officer has disallowed a sum of Rs.71,40,599/- on the ground that excess depreciation was claimed by the assessee for this assessment year. The ld. Assessing Officer thereafter again issued notice under section 148 of the Income Tax Act on 26.03.2021. The ld. Assessing Officer has passed the impugned assessment order under section 147 read with section 143(3) of the Income Tax Act on 30.03.2022. The ld. Assessing Officer has observed that during the search conducted at the premises of the assessee on 20.09.2019, certain documents were found and seized. These documents were inventoried as SD ABCI 03, page 53, which according to him contains ledger account of M/s. Silverpoint Infratech Limited in the books of ABCI Infrastructure Pvt. Limited for the period 1st of April, 2012 to 31st March 2013. He further observed that this Silverpoint Infratech Limited was stated to be a Company, which has provided accommodation entries to various persons/Companies. For buttressing this observation, he made reference to the statement of Shri Sanjay Kumar Drolia, son of Shri Shyam Sundar Drolia, who is a Director of M/s. Silverpoint Infratech Limited. He also made reference to the statement of Shri Manish Sureka connected with M/s. Silverpoint Infratech Limited. He found that

the assessee had paid a sum of Rs.63,11,55,000/- to the Company M/s. Silverpoint Infratech Limited through banking transaction. He was of the view that this amount has been routed through this company and received back by the assessee. Accordingly he made an addition of Rs.66,40,68,972/-.

4. On appeal, the ld. CIT(Appeals) has observed that the assessee has submitted that it is a ledger account of M/s. Silverpoint Infratech Limited in the books of ABCL Infrastructure Pvt. Limited. The assessee got contracts from three companies, namely Patel Engineering Limited, Mumbai, Coastal Projects Limited, Hyderabad; Horizon Infrastructure Limited. These were sub-contracted on back to back basis to M/s. Silverpoint Infratech Limited and accordingly payments were made to M/s. Silverpoint Infratech Limited by keeping a 3% margin. The ld. CIT(Appeals) enhanced this margin to 6.1%. Thus the assessee is aggrieved with reopening of the assessment and estimation of income on *ad hoc* basis out of the alleged sub-contract assignment. On the other hand, Revenue is aggrieved from restriction of the addition to 6% of the gross receipts of the contract, instead of confirming the addition made by the ld. Assessing Officer.

5. In view of the above brief history, now let's take the grounds of appeal in seriatim.

6. Firstly take the grounds of appeal raised by the assessee, i.e. **ITA No. 40/GAU/2022**.

7. In Grounds No. 1, 2, 3, 7 & 8, the assessee has challenged validity of reopening as well as passing of the impugned order. If we divide the grievance of assessee in different compartments, then ld. Counsel for the assessee has demonstrated the grievance of the assessee basically in two-folds namely-

(a) whether ld. Assessing Officer has jurisdiction to issue notice upon the assessee under section 148 for reopening of the assessment inspite of the fact that a search has been conducted upon the assessee under section 132 of the Income Tax Act;

(b) whether ld. Assessing Officer was possessing any material, which can enable him to form a belief that income has escaped assessment.

The answer to the second question would arise upon the finding of the first question. In case, it is held that ld. Assessing Officer was having jurisdiction to issue notice under section 148, inspite of procedure contemplated in section 153A of the Act, only then it is to be examined whether this notice fulfilled the conditions contemplated in section 147 of the Act or not.

8. Before proceeding further, we deem it pertinent to take note of the reasons recorded by the Id. Assessing Officer and the copy of which is available on pages no. 26 to 30, which read as under:-

“1. The assessee company submitted its return of income for the Assessment year 2013-14 on 22/09/2013 declaring total income of Rs.20,20,75,870/-. The case was selected for scrutiny through "CASS" and the assessment proceeding under section 143(3) of the Income Tax Act, 1961 was completed on 30/03/2016 determining the assessed income of the assessee company at Rs. 21,21,04,560/-. Thereafter, the assessment proceeding under section 147/143(3) was completed on 18/12/2017 determining the assessed income of the assessee company at Rs.21,92,45,159/- after disallowing of Rs.71,40,599/- Excess Depreciation claimed by the assessee for the relevant assessment year.

2. The DDIT (Inv), Unit-1 (2), Guwahati has informed that during the course of search and seizure operations conducted at the Registered office of M/s ABCI Infrastructures Pvt. Ltd. at Knowledge Hub, DN - 23, 2nd Floor, Sector - V, Salt Lake, Kolkata - 700 091 on 20/09/2019, certain documents were found and seized. Upon examination of Page - 53 of the seized document marked as SD - ABCI - 03, it is seen that the said page contains the ledger account of M/s Silverpoint Infratech Ltd. in the books of M/s ABCI Infrastructures Pvt. Limited for the period 01/04/2012 to 31/03/2013.

3. With regard to the aforesaid company M/s. Silverpoint Infratech Ltd, it is relevant to point out that various persons operating the company or associated with the company have from time to time admitted to use the company for proving accommodation entries in the form of bogus bills to various entities. For instance, on 25/06/2014, Shri Sanjay Kumar Drolia, S/o Shri Shyam Sundar Drolia who is a Director of M/s Silverpoint Infratech Ltd. gave a statement u/s 131 of the Act under oath to the DDIT(Inv.), U-2(3), Kolkata, in which he explained how he used M/s. Silverpoint Infratech Ltd. to provide bogus contract bills to many companies on commission basis. He explained in detail the modus operandi by which the money

transferred to M/s Silverpoint Infratech Ltd. came back to the concerns of the clients .Again on 06/09/2016, Shri Sanjay Kumar Drolia stated in his deposition before the department that through entities controlled and managed by him and others, including M/s. Silverpoint Infratech Ltd, he had provided accommodation entries to various beneficiaries in lieu of commission.

Similarly, Shri Manish Sureka (one of the directors of the company M/s Silverpoint Infratech Limited), in his statement recorded u/s 131 of the Act under oath by the ADIT(Invt.), U-3(2), Kolkata on 22/01/2014 accepted to providing accommodation entries through entities controlled and managed by him and others, including M/s. Silverpoint Infratech Ltd. He had provided such accommodation entries to various beneficiaries in lieu of commission. Thus, M/s. Silverpoint Infratech Limited was instrumental in providing such accommodation entries.

3. It is noticed that during the Financial Year 2012-13, the assessee company M/s. ABCI Infrastructures Pvt Ltd had paid a sum of Rs.63,11,55,000/- to the company M/s. Silverpoint Infratech Limited through banking transactions. In the Financial Year 2012-13, the turnover of the company M/s. Silverpoint Infratech Limited reached its peak and declined thereafter. Upon examination of the Audit Report of the company M/s. Silverpoint Infratech Limited, it is noticed that M/s Silverpoint Infratech Ltd was shown to be in the business of “Civil Contractors”.

4. During the course of search proceeding, Shri Budhmal Baid, Managing Director of the assessee company, was confronted on the contents of seized document SD -ABCI - 03 in his statement recorded u/s 131(1A) of the Income Tax Act, 1961 on 24/09/2019. He stated that it was a ledger account of M/s Silverpoint Infratech Ltd. in the books of M/s ABCI Infrastructures Pvt. Limited for the period 01/04/2012 to 31/03/2013. M/s ABCI Infrastructures Pvt. Ltd. had got contracts from three companies namely Patel Engineering Limited, Mumbai, Coastal Projects Limited, Hyderabad and Horizon Infrastructure Limited, Mumbai and these were again sub-contracted on back to back basis to M/s Silverpoint Infratech Ltd. and accordingly payments were made to M/s Silverpoint Infratech Ltd. by keeping a 3% margin.

5. I have applied my mind to the information provided by the DDIT(Inu), Unit-1(2), Guwahati and upon verifying the records find that out of the total transfer of Rs.63,11,55,000/-, an amount of Rs. 41,88,35,026/- has been transferred by M/s ABCI -Infrastructures Pvt. Ltd. on various dates to Account No. 00088260000116 maintained by M/s Silverpoint Infratech Ltd. with HDFC Bank. The funds were immediately transferred by M/s Silverpoint Infratech Ltd. to three different accounts maintained by (i) M/s Argo Trade and Commerce, (ii) Wilson Projects and (iii) Elegant Constructions. The above mentioned 3 firms simultaneously transferred the amounts on the same day or the day after to the following four companies in their respective accounts with HDFC Bank:

Sl. No.	Name of the company	Account No.	Name of the Bank
1.	ShivdhanVinimay Pvt. Ltd	00080350002756	HDFC
2.	Softlink Shoppers Pvt. Ltd.	00080350002818	HDFC
3.	EverstrongVintrade Pvt. Ltd.	00080350002749	HDFC
4.	Tycoon Commosale Pvt. Ltd.	00080350002790	HDFC

The abovementioned four companies were found to be Jamakarchi/shell companies and appear in the database of Entry Operators / Entry providing paper companies / Dummy Directors compiled by the Directorate of Income Tax (Inv.), Kolkata. All these companies are controlled by Mr. Abhishek Chokani as per the above database. In his statement u/s 132(4) of the Income-tax Act, Shri Abhishek Chokani had admitted that he was providing accommodation entries and bogus billing in the form of commission, construction, labour charges and professional fees to the beneficiary companies.

6. The ITR, Tax Audit Report, Balance Sheet and Profit & Loss Account of the company, M/s Silverpoint Infratech Limited, were obtained from DDIT (Inv.) Unit-2(2); Guwahati and examined for the relevant year. The company had shown a turnover of more than Rs. 250 crores under the claimed field of operations, i.e., "Civil Contractors", however, the major expenditure amounting to Rs. 249 crores has been made on purchases as shown in the ITR. Salaries and Wages amount to

Rs. 14 lakhs only. There are no sub-contract expenses incurred as per the ITR of the company Silverpoint Infratech Limited. The tangible assets of the said company at the end of the relevant year were worth approx. Rs. 37 lakhs only and the expense of depreciation & amortization as per the P&L Account is approx. Rs. 4 lakhs only. In addition, it was also noticed that no expenditure was incurred towards rent on plant and Machinery. All these characteristics are contradictory to the nature of business of a Civil Contractor. From the above analysis done by me, I am satisfied that the company Silverpoint Infratech Limited did not do any actual work as a "Civil Contractor" and is merely a paper entity.

7. *As a part of further investigation in the case, during the course of assessment proceeding u/s 153A in the case of M/s ABCI Infrastructure Private Limited, the assessee furnished before me the work order given by M/s ABCI Infrastructure Private Limited to Silverpoint Infratech Limited. Upon examination of the said work order by me, it was found that para 4 of the Terms & Conditions states regarding "Obligation of Silverpoint Infratech Ltd." that Silverpoint Infratech Ltd. shall provide all superintendence, labour, materials, plant, equipment and all other thing, whether of a temporary or permanent nature, required in and for such execution and completion of the works and remedying of any defects therein so far as the necessity for providing the same is specified in or is reasonably to be inferred from Work Order .The copy of the purported contracts entered into by M/s ABCI Infrastructure Private Limited with Silverpoint Infratech Ltd clearly indicate that the work contracts were regarding construction of unlined drains, temporary diversions, ground improvement, rock cutting etc. in various Highway Projects, which are works requiring heavy engineering machinery and the work was to be executed by M/s Silverpoint Infratech Limited as per terms of contract. However, in the preceding para, it has been clearly outlined that no actual work was done by the company Silverpoint Infratech Limited, nor was any sub-contract given by it to any other entity. It is thus evident that M/s Silverpoint Infratech Limited provided accommodation entry in the form of bogus sub-contract expense to the beneficiary company M/s ABCI Infrastructure Private Limited. The true nature of this transaction with M/s Silverpoint Infratech Limited was not disclosed by the assessee company M/s ABCI Infrastructure Private Limited at the time of filing of return of income as well as at the time of assessment proceeding u/s*

143(3) or during the reassessment proceeding under section 147 of the Income Tax Act, 1961.

8. On the basis of the examination of the relevant records done by me and the facts as discussed above, I have reason to believe that income has escaped assessment in the case of the assessee because of failure on the part of the assessee to disclose true and complete facts in this case since the assessee company had taken accommodation entry in the form of bogus sub-contract bill amounting to Rs.63,11,55,000/- from M/s Silverpoint Infratech Limited and not disclosed true and complete facts about the nature of the transaction. This is nothing but an attempt to deflate its profit by taking accommodation entries, thereby evading tax.

9. Even though the assessee had filed a copy of annual report and audited P&L Account and balance sheet along with return of income where various information/material were disclosed. But the true nature of the transaction as discussed in the preceding paras was not disclosed by the assessee. The facts discussed in the preceding paras are such that the true colour of the transaction could not be discovered by the AO with any amount of due diligence at the time of assessment. It is only after the information in this regard was received from the investigation wing and further inquiry, examination and investigation were conducted by me that it came to light that the transaction discussed in the preceding paras was nothing but accommodation entry taken in the form of bogus sub-contract expenses.

9. The ld. Counsel for the assessee while impugning the findings of both the authorities took us through section 153A, 147 and 148 of the Income Tax Act. He contended that basically construction/ interpretation of sections 147 /148 is not in much dispute under the present question, but it is very much necessary to explain the scope of section 153A for assessment of the income of the assessee in this assessment year, in this

connection he filed a written submission and placed on record a very lucid and exhaustive note. We deem it appropriate to take note relevant part of his submissions on this issue, which read as under:-

“Ground No. 2: Notice issued u/s 147 is bad in law as it is a search and seizure case.

Firstly, it is submitted that a search and seizure operation u/s 132 of the Act was conducted at the registered office of the assessee company at Knowledge Hub, DN 23, 2nd floor, Sector V, Salt Lake, Kolkata 700 091 on 20.09.2019 and pursuant to the said search and seizure operation, following notices were issued to the assessee company:

Notices u/s 153A dated 04.02.2021 were issued for AY 2014-15 to 2019-20 (for six assessment years)

Notice u/s 148 dated 26.03.2021 was issued for AY 2013-14

In this connection it is submitted that pursuant to search and seizure operations, 153A/153C proceedings commences and the Ld. A.O. is required to issue notice only u/s 153A/153C of the IT Act, 1961 for the six assessment years or for ten assessment years (from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made) provided the Ld. A.O. has in its possession some incriminating material or the income represented in the form of asset has escaped assessment amounting to Rs. 50 lakhs or more. In the case of the assessee, since search and seizure was conducted on 20.09.2019, the impugned assessment year (AY 2013-14) was well within the time limit for issuance of notice u/s 153A of the Act. Thus, the impugned year was the Seventh Assessment year preceding the assessment year relevant to the previous year in which a search is conducted or a requisition is made.

Section 153 A of the Act specifies the procedure for assessment where a search has been initiated u/s 132 against the Assessee:-

- a. Under clause (a) of section 153 A(1) of the Income Tax Act, 1961 the Assessing Officer shall issue notice to the Assessee requiring him to furnish within such period as may be specified in the Notice, the return of income in respect of each assessment year falling*

within six assessment years prior to the assessment year relevant to the previous year in which search was initiated and for the relevant assessment year or year . At this juncture it may be brought to the attention of your goodself that the expression “and relevant assessment year or years ” was added by Finance Act, 2017 w.e.f. 01.04.2017. Prior to 01.04.2017 the Ld. AO could issue notices u/s 153A for only six years prior to the assessment year relevant to the previous year in which search was conducted.

- b. Under clause (b) of section 153A the Assessing Officer shall then assess, or reassess the total income of the Assessee for each of these 6 AYs and the relevant assessment year or years. Here also the expression “relevant period” was introduced only by Finance Act, 2017 w.e.f. 01.04.2017. Prior to 01.04.2017 the power to assess or reassess the income pursuant to search was restricted to six assessment years prior to the assessment year relevant to previous year in which search was conducted. However this power to assess or reassess income u/s 153A is not unfettered as brought out in the 2nd proviso to section 153A(1) wherein it is stated that assessment or reassessment relating to any assessment year falling within six assessment years and for the relevant assessment year or years “pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate” clearly stating that assessments or reassessments not pending on the date of initiation of search remains unabated and cannot be disturbed except in cases where incriminating material indicating otherwise has been found in the course of search. This view has been upheld in many judicial authorities as will be brought out in the discussion in the later parts of this submission.
- c. The expression “relevant assessment years” introduced by Finance Act, 2017 have been defined in Explanation 1 to section 153A(1) to mean assessment year relevant to the previous year in which search was conducted which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which the search was conducted.
- d. Further as brought out in proviso 4 to section 153A(1) the power to issue notice u/s 153A for “six assessment years” stands on a different footing from the power to issue notices u/s 153 A for “relevant assessment years” in as much as while issuance of notice u/s 153 A pursuant to search action u/s 132 for six assessment years prior to the assessment year relevant to the

previous year in which search is conducted is mandatory, the issuance of notice for the “relevant period” is subject to the fulfillment of conditions laid down in the 4th proviso to section 153A of the Income Tax Act, 1961. The conditions so laid down, fulfillment of which can only lead to issuance of notice u/s 153A for the relevant assessment years are as under:-

- (i) The search must have been initiated u/s 132 on or after 01.04.2017,*
 - (ii) He must have in his/her possession books of account or other documents or evidence,*
 - (iii) Such books of accounts, or documents or evidence unearthed during the search, reveals that the income, represented in the form of an asset/assets, has escaped assessment,*
 - (iv) This undisclosed income in the form of an asset/assets that has/have escaped assessment must amount to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years.*
- e. Therefore subsequent to the search action u/s 132 of the Income Tax Act, 1961, on any assessee, section 153 A comes into play leading to :-*
- (i) Automatic issuance of notices under section 153A for six assessment years prior to the assessment year relevant to the previous year in which search was conducted and*
 - (ii) if the Assessing Officer comes in possession of any such incriminating material (unearthed during the course of search) which evidences the fulfillment of the aforementioned conditions, it is only then that notice(s) u/s 153(1)(a) can be issued for the “relevant assessment years” i.e., the period beyond six assessment years but not beyond ten assessment years prior to the assessment year relevant to the previous year in which search was conducted.*

Thus, applying the above principle to the facts of the instant case, it can be seen that since search and seizure operation was carried out in the assessee’s premises on 20.09.2019, the Ld. A.O. is mandatorily required to issue notice only u/s 153A for the six assessment years i.e. AY 2014-15 to 2019-20 and for relevant years

i.e. for AY 2011-12, 2012-13 and AY 2013-14 only if any such incriminating material was found during the course of search and seizure. Therefore, in the case of the instant case of the assessee, since AY. 2013-14 falls within the definition of relevant assessment year, the Ld. A.O. could have issued notice u/s 153A only if some incriminating material was found during the course of the said search and seizure operations. Thus, assessments in the case of search particularly in case of unabated years has to be restricted to materials found during the course of search. Thus, in the instant case of the assessee nothing incriminating material was unearthed during the course of search and seizure operations; therefore the Ld. A.O. cannot issue notice u/s 153A for relevant assessment years. In the present case, the Ld. A.O. has issued notice u/s 148 for AY 2013-14 which is completely without jurisdiction and bad in law. In light of the aforesaid provisions of 153 A of the Act, the Ld. A.O. cannot issue notice u/s 148 for the aforesaid assessment year, therefore the impugned notice issued u/s 148 dated 26.03.2021 for AY 2013-14 is bad in law and without jurisdiction.

Further, attention is sought to the amendments brought by the Finance Act, 2022 which says that the Ld. A.O. shall serve notice u/s 148 of the Act when a search is initiated u/s 132 or books of account, other documents or any assets are requisitioned under section 132A on or after 1st day of April, 2021. Thus, when a search is initiated after 01.04.2021, then the Ld. A.O is required to serve notice u/s 148 of the Act and thus the old provisions of section 153 A stands abolished. Therefore, in the instant case of the assessee since search took place on 20.09.2019, the Ld. A.O. can issue notice only u/s 153A of the Act for six assessment years and for the relevant years (only when incriminating documents are unearthed during the course of search) not exceeding ten assessment years. Therefore, the impugned notice issued by the Ld. A.O. u/s 148 of the Act is completely beyond jurisdiction.

Now let us discuss the definition of asset which is defined in Explanation 2 to Fourth Proviso of section 153A(1) of the IT Act, 1961.

Explanation 2:- for the purpose of the fourth proviso, "asset" shall include immovable property being land or building or both; shares and securities, loans and advances, deposits in bank account.

Thus as per Explanation 2, for the purpose of fourth proviso to section 153 A(1) of the Act, the expression "asset" has been inclusively defined to include Only the following assets namely:

*Immovable property being land and building or both;
Shares and securities;
Loans and advances;
Deposits in bank account.*

From the perusal of the above definition of the Expression "Asset", the asset which are not included in the expression "Asset" as per the above Explanation 2, cannot be considered for the purpose of the Fourth Proviso to section 153 A(1) of the Act.

By specifically referring to the expression "Undisclosed Asset", the Legislature has impliedly excluded other items of income viz., liabilities/credits, unexplained expenditure etc. Hence from the above discussion, it is clear that section 153A of the Act can be invoked only if the Assessing Officer comes to a positive conclusion that he has in his possession documents or information revealing an Undisclosed asset of the assessee qua the assessment year (7th to 10th) which is valued Rs.50 lakhs or more.

In the instant case of the assessee, the impugned document based on which the Assessing Officer had issued notice u/s 148 of the Act, admittedly pertains to an item of expense (i.e. Sub-contract paid). As discussed earlier, the undisclosed expense, undisclosed revenue, undisclosed loans/liabilities are not in the nature of an Asset and therefore these items fall outside the scope of the fourth proviso to section 153 A(1) of the Act.

In view of the above facts, it is thus clear that since the impugned year is a relevant assessment year, notice could have been issued only u/s 153A of the Act. However for the impugned assessment year even notice u/s 153 A of the Act cannot be issued as the document based on which the Assessing Officer had relied pertains to an item of expense which is outside the scope of definition of "Asset" as defined in Explanation 2 to fourth proviso of section 153A(1) of the IT Act, 1961.

10. On the other hand, ld. D.R. relied upon the finding of the ld. Assessing Officer. He submitted that Department was able to lay its hand on concrete information demonstrating the fact that the alleged sub-contractor to M/s. Silverpoint Infratech Limited was

actually a bogus entry provider because ultimately M/s. Silverpoint Infratech Limited has transmitted these sums to six paper companies. He put emphasize on the observations of the ld. Assessing Officer in the notice issued under section 148 of the Income Tax Act.

11. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry as to what is the true procedure contemplated in the Income Tax Act when search is conducted on the premises of an assessee, we think it appropriate to bear in mind certain basic points of the scheme of search of assessment provided in the Income Tax Act. Though the present Income Tax Act came into existence in 1961 but without referring to very old provision, we observe that vide Finance Act, 1995 (22 of 1995), a new Scheme was introduced of assessment of undisclosed income determined as a result of search. Under this Scheme, the undisclosed income deducted as a result of search initiated after June 30, 1995 is assessed separately as the income of a designated period (Block) consisting of ten previous years prior to the previous year in which the search was conducted and also the period of the current previous year upto the date of search. The undisclosed income is taxed at a flat rate of 60%. Thus vide Chapter 14B, the provisions under section 158B to 158BH were introduced, which provided the procedure how to compute undisclosed income for this block period of ten years. It is pertinent to observed that as far as

regular assessment of the assessee is concerned, it has to continue parallelly because in the block assessment, income was to be determined only on the basis of seized material found during the course of search, whereas the regular item of income under day-to-day business, which is available in the books of account of the assessee are to be determined under section 143(3)/147 of the Income Tax Act (as the case may be).

12. The Parliament vide Finance Act, 2003 (32 of 2003) has discontinued the block assessment provision contained in Chapter 14B (sections 158B to 158BH) and introduced a new Scheme under sections 153A, 153B, 153C etc. for the purpose of issue in hand. Section 153A is the relevant provision therefore, it is imperative upon us to take note of this provision. The relevant part of this section reads as under:-

In this connection attention is sought to the provisions of section 153A (1) of the IT Act, 1961 which reads as under:

“Assessment in case of search or requisition.

153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years/ referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be,

apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made [and for the relevant assessment year or years] :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years]:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years [and for the relevant assessment year or years] referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.....

[Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.—For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.—For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

13. A perusal of this section would indicate that where a search has been conducted under section 132 of the Income Tax Act upon the assessee, then the assessment of the income has to be determined under section 153A of the Income Tax Act. Under Clause (a) of section 153A of the Income Tax Act, 1961, ld. Assessing Officer shall issue notices to the assessee requiring him to furnish within such period as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years prior to the assessment year relevant to the previous year in which search was initiated and for the relevant assessment year or years. This expression relevant assessment year or years has been added by the Finance Act, 2017 with effect from 01.04.2017. Prior to 01.04.2017, the ld. Assessing Officer was required to issue notice under section 153A for only six years prior to the assessment year relevant to the previous year in which search was conducted.

14. Under Clause (a) of Section 153A, the ld. Assessing Officer shall assess or re-assess the total income of the assessee for each of these six years and the relevant assessment year or years. As observed earlier, this expression relevant period, was introduced only by Finance Act, 2017 w.e.f. 01.04.2017. Prior to 01.04.2017, the power to assess or reassess the income pursuant to search

was restricted to six assessment years prior to the assessment year relevant to the previous year in which search was conducted. In other words, notice could be issued for seven years including the year in which search was conducted. However, this power to assess or reassess income under section 153A is not unfettered as brought out in the 2nd proviso to section 153A(1), wherein it is provided that assessment or re-assessment relating to any assessment year falling within six assessment years and for the relevant assessment year or years pending on the date of the initiation of search under section 132 or requisitioned under section 132A, as the case may be, shall abate. Thus it has been provided that the assessment or re-assessment not pending on the date of initiation of search would remain unabated and cannot be disturbed except in case where incriminating material indicating otherwise has been found in the course of search. This view has been expressed by all the Benches of the Tribunal across India and affirmed unanimously by majority of the Hon'ble High Courts. The Hon'ble Delhi High Court in the case of CIT -vs.- Kabul Chawla reported in 61 taxmann.com 412 has propounded the following legal position:-

“37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

(i) Once a search takes place under Section 132 of the Act, notice under Section 153 A(l) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

(ii) *Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as afresh exercise.*

(iii) *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*

(iv) *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

(v) *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*

(vi) *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

(vii) *Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment".*

15. Thus the scope of section 153A has been explained by the Hon'ble High Courts in a manner that income could only be determined on the basis of incriminating material found during the course of search. The Hon'ble jurisdictional High Court has also concurred with the view of the Hon'ble High Court in the judgment of Pr. CIT -vs.- Salasar Stock Broking [ITAT No. 264 of 2016, G.A. No. 1929 of 2016 (Calcutta High Court)].

16. Coming back to the remaining part of section 153A, it is pertinent to note that expression 'relevant assessment year' introduced by Finance Act, 2017 has been defined in Explanation 1 to Section 153A(1). According to this Explanation, the expression 'relevant assessment years' means assessment year relevant to the previous year in which search was conducted, which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which the search was conducted. In other words, the scope of six years originally introduced has been extended upto ten years on fulfilment of certain conditions as laid down in 4th proviso to section 153A. If we look forward to proviso no. 4 to this provision, then it would contemplate that the power to issue notice under section 153A for six assessment years stands on a different footing from the

power to issue notice under section 153A for relevant assessment year. In other words, the original scheme is on different footing, whereas the new scheme introduced by way of a Finance Act, 2017 is different. The issuance of a notice for the relevant period is subject to the fulfilment of conditions and such conditions are –

- (a) the search must have been initiated under section 132 on or after 01.04.2017;
- (b) The ld. Assessing Officer must have in his possession books of account or other documents or evidences;
- (c) Such books of account or documents or evidence unearthed during the search should reveal that income represented in the form of an asset/assets has escaped assessment;
- (d) This undisclosed income in the form of an asset or assets that has escaped assessment amount to or likely to amount of 50 lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years.

In other words, there must be a search that should resulted into discovery of evidence in the shape of books of account or other documents exhibiting the embedded asset/assets, which is an escaped income and the value of such income is more than 50 lakh rupees. It can be in one year or in the remaining three years. In other words, it can be available in one relevant year in aggregate in the relevant assessment years.

17. Thus after the search under section 132 of the Income Tax Act on any assessee. Section 153A comes into play leading to:-

(a) Academic issuance of a notice under section 153A for six assessment years prior to the assessment year relevant to the previous year in which search was conducted; and

(b) if the ld. Assessing Officer comes in possession of any such incriminating material unearthed during the course of search, which demonstrate the fulfilment of the aforementioned conditions. He would issue notice under section 153(1)(a) for relevant assessment years i.e. period beyond six years but not

beyond ten assessment years prior to the assessment year relevant to the previous year in which search was conducted.

18. Let us examine the facts of the present case in view of the above proposition. There is no dispute that search was conducted on the premises of the assessee on 20.09.2019. The ld. Assessing Officer was mandatorily required to issue notice only under section 153A for six assessment years i.e. A.Y. 2014-15 to 2019-20 and for the relevant years i.e. for A.Ys. 2011-12, 2012-13 and 2013-14 only if any such incriminating material was found during the course of search and seizure, thus in the case of the present assessee, the assessment year before us is part of the relevant assessment year provided by Finance Act, 2017. In other words, A.Y. 2013-14 would be considered under relevant assessment year for issuance of a notice under section 153A if conditions provided in 4th proviso are fulfilled. The notice could have been issued under section 153A only if some incriminating material was found during the course of search and seizure operations. In the present case, no incriminating material was found. The ld. Assessing Officer in the reasons for reopening has made reference to a ledger account that is seized documents inventorized as SD ABCI 03, page 53. According to the ld. Assessing

Officer, it is a ledger account of M/s. Silverpoint Infratech Limited. It is to be appreciated that original assessment was scrutiny assessment passed on 30.03.2016. This ledger account must have been looked into or it is to be deemed as looked into as per the judgment of the Hon'ble Supreme Court in the case of CIT -vs.- Kelvinator India Limited reported in 320 ITR 561 (SC), wherein the Hon'ble Supreme Court has affirmed the decision of Full Bench of the Hon'ble Delhi High Court, which has laid down that if scrutiny assessment has been passed then it is to be assumed that all details have gone through. Once a search has been conducted after 01.04.2017, then upto ten assessment years notice under section 153A could only be issued and not 148. In the present case, since conditions stipulated in 4th proviso to section 153A could not be fulfilled, therefore, even no notice under section 153A could be issued. Presumably the ld. Assessing Officer was aware that notice under section 153A will not be sustainable and, therefore, did not issue. But alternatively there is no mechanism that notice under section 148 was to be issued. Thus the notice is invalid and *void ab initio*. On the strength of this show-cause notice if assessment is made, it deserves to be quashed.

19. Though adjudication of rest of the grounds of appeal would be an academic one. But the kind of revenue involved in the present appeal, it will certainly lead to higher appellate forum, therefore, for the purpose of completeness of finding of fact, we deem it appropriate to take up other grounds of appeal, which were raised before us.

20. Without getting ourselves influenced by our finding on the first fold of grievance, let us assume, for the sake of argument that no notice under section 153A was required to be issued but only under section 148, then we have to appreciate whether conditions for reopening the assessment are available or not. In this connection, we deem it appropriate to take note of the relevant part of the section 147 of the Income Tax Act, which reads as under:-

“147. Income escaping assessment: If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

21. Ld. Counsel for the assessee while taking us through the above provision has submitted that this section

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

22. A bare perusal of the above provision would reveal that before issuance of a notice under section 148 of the Income Tax Act for reopening of assessment, the ld. Assessing Officer having jurisdiction over the assessee has to satisfy two conditions before acquiring jurisdiction to issue such notice and thus the conditions are-

(i) He must have reasons to believe that income chargeable to tax has escaped assessment;

(ii) This belief should have a nexus with the information possessed by him.

Since in the present case, earlier scrutiny assessment under section 143(3) was made, thereafter assessment

was reopened by issuance of a notice under section 148 of the Income Tax Act and again a reassessment order was passed on 18.12.2017 under section 143(3) read with section 147. Therefore, proviso to this section would puts an embargo upon the powers of the ld. Assessing Officer to issue a notice upon the assessee unless he demonstrated that on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. In other words, the ld. Assessing Officer has to demonstrate how assessee has failed to disclose all material facts fully and truly which resulted the income escaped from taxation.

23. Though before us, ld. Counsel for the assessee has filed a very detailed submission on this point also and relied upon a large number of decisions starting from the judgment of the Hon'ble Supreme Court in the case of ITO, Calcutta & Ors -vs.- Lakhmani Mewal Das (1976) 103 ITR 437 (SC), judgment of the Hon'ble Supreme Court in the case of Kelvinator India Limited (supra), judgment of the Hon'ble Calcutta High Court in the case of Peerless General Finance And Investment Co. Limited -vs.- DCIT & Ors. reported in (2005) 273 ITR 16 (Cal.) and a number of other decisions from different Hon'ble High Courts. We may make a reference of the Hon'ble Delhi High Court decisions in the case of CIT -vs.- SFIL Stock

Broking Limited reported in 325 ITR 285 (Del.), Pr. CIT – vs.- G And G Pharma India Limited reported in 384 ITR 147 (Del.). We do not deem it necessary to recite and recapitulate the proposition laid down in all these decisions but suffix to make an observation that common emphasis in all these decisions is to the effect that reasons for the formation of belief must have a rational connection with the relevant bearing with the information received. Rational connection postulates that there must be direct nexus or live nexus between the material coming to the notice of Income Tax Officer and the formation of belief that there has been escapement of income of the assessee.

24. Now let us look into the opinion possessed by the Id. Assessing Officer for forming the belief that an assessment which was passed under section 143(3) and thereafter reassessed under section 147 required to be reopened again. The perusal of the reasons extracted supra would reveal that the allegation of the Id. Assessing Officer is that during the course of search, a document was found inventorized as SD ABCI 03 page 53. Now this document cannot be an incriminating document because it is part of a ledger account in the books of the assessee. Ledger account of one company namely M/s. Silverpoint Infratech Limited is available. This

ledger must have been processed during the scrutiny assessment or at the most reassessment proceedings. At this stage, it is pertinent to observe that the assessee got different contracts, which were assigned to M/s. Silverpoint Infratech Limited back to back after retaining the commission, the details of such contract contained in this ledger are as under:-

Name of the party form whom the work order was received by the Appellant	Amount of Invoice raised by the Appellant (in Rs)	Name of the party to whom the work contract was given on "Back to Back " basis	Amount of Invoice raised on the Appellant by the Sub contractor (in Rs)	Profit of the Appellant (in Rs)	Profit earned by the Appellant (in %)
Coastal Projects Ltd	12,64,98,206	Silverpoint Infratech Ltd.	12,27,03,260	37,94,946	3.00%
Coastal Projects Ltd	2,60,02,046	Silverpoint Infratech Ltd.	2,52,21,984	7,80,062	3.00%
Patel Engineering Ltd	19,66,94,778	Silverpoint Infratech Ltd.	19,07,93,935	59,00,843	3.00%
Horizon Infrastructure Ltd	30,95,81,280	Silverpoint Infratech Ltd.	29,98,60,847	97,20,433	3.14%
	65,87,76,310		63,85,80,026	2,01,96,284	

25. A perusal of the table would indicate that the assessee itself has offered profit @ 3% and on the last contract at 3.14%. This total profit is around Rs.2,01,96,284/-. It has been assessed to income and once it has been assessed to income, then it is to be construed that this ledger account must have been gone through by the ld. Assessing Officer in two scrutiny assessments, then whereas the failure or omission at the end of the assessee to disclose all material facts fully and truly.

26. The next item of evidence referred by the ld. Assessing Officer is that statement of one Shri Sanjay Kumar Drolia, S/o. Shyam Sunder Drolia, who was a Director of M/s. Silverpoint Infratech Limited, was recorded on 25.06.2014 and in his statement, he submitted that this company provides bogus contract bills to many companies on commission basis. In subparagraph 3 of the reasons, this factum has been mentioned. Thereafter ld. Assessing Officer has referred this factum as on 06.09.2016. It is to be appreciated that the first date of statement i.e. 25.06.2014 is prior to scrutiny assessment passed in the case of the assessee under section 143(3) on 30.03.2016. If this information was possessed by the Revenue in 2014, then why, while assessing the income of the assessee from assignment of sub-contract of the above projects was accepted by the Revenue. It could have been enquired at that point of time and assessee could be show-caused that it is a bogus profit shown by you, the assessee could have been confronted to explain why the total contract value should not be looked into. As far as the second statement is referred on 06.09.2016 is concerned, it is also prior to the reassessment order passed on 18.12.2017, then how it can be construed a fresh information came to the possession of the ld. Assessing Officer after the reassessment order, which can help the ld. Assessing Officer to form a belief that income has escaped assessment. The ld. Assessing Officer thereafter alleged that M/s. Silverpoint Infratech Limited has credited the amount in the accounts of four companies. Now, how it is a relevant information

for the assessment of the assessee.. If ld. Assessing Officer was able to lay his hand on an information, which can complete the chain namely money travelled to Silverpoint Infratech Limited, thereafter same money transferred to the some companies and those four /six companies have re-transferred that money to the assessee. The reference to the four companies is only in the context that in the data-base of the Income Tax Department, these companies are entry providers therefore, if M/s. Silverpoint Infratech Limited has transmitted any money to those companies, then it is to be construed that all transactions of any person connected or not would be considered as bogus. It is very farfetched inference of the Department for harboring belief that income of the assessee has escaped assessment.

27. The ld. Counsel for the assessee has brought to our notice the following submissions:-

“In regard to the above attention of your Honours is sought to the following submission:

(viii) There is no finding of the Ld. A.O. that the corresponding works/contracts which were awarded to the assessee by Coastal projects Ltd/ M/s Patel Engineering Ltd / M/s Horizon Infrastructure Ltd were not actually completed.

(ix) Further, the Ld. A.O. failed to appreciate that there is not only an immediate and back to back contracting and sub-contracting of the corresponding contracts qua M/s Coastal Projects Ltd/ M/s Engineering Ltd/ M/s Horizon Infrastructure Ltd and the sub-contracting of these contracts by the assessee to M/s Silverpoint Infratech Ltd but it is evident that there is back to back receipts of funds by the assessee from (M/s Coastal Projects Ltd/ Ms Patel Engineering Ltd /M/s Horizon Infrastructure Ltd) and payments to Silverpoint Infratech Pvt Ltd

(x) *The assessee submits that during the year under consideration, the assessee is engaged in the business of construction of various infrastructure projects in the form of development of roads, railways, etc*

(xi) *Against the aggregate contract revenue of Rs. 65,87,75,909/- earned by the assessee, the assessee had sub-contracted the entire contracts after keeping margin of Rs. 2,01,95,883/- (i.e. around 3% of the total contract revenue of Rs. 65,87,75,909/-) and thus, the Appellant had acted merely as a conduit / confirming party between the contract awarding parties (i.e. M/s Coastal Projects Ltd / M/s Patel Engineering Ltd / M/s Horizon Infrastructure Ltd) on one hand AND M/s Silverpoint Infratech Private Limited on the other hand.*

(xii) *Further it is submitted that the AO had not averred or given any finding that the corresponding Revenue Earned by the Appellant from M/s Coastal Projects Ltd / M/s Patel Engineering Ltd / M/s Horizon Infrastructure Ltd was bogus revenue. In fact the AO had accepted the revenue earned by the Appellant. It was also accepted by the learned Assessing Officer that the corresponding contract revenue was received by the Appellant through/in its bank and further TDS was also deducted by the contract awarding parties. (Copy of bank statement showing the same is enclosed with this submission)*

Hence, the major facts being on record, it was the responsibility of the learned Assessing Officer to have conducted proper enquiries in this regard. Merely placing reliance on the statements recorded by the officer of the Investigation Wing cannot justify the action of the Assessing Officer. It is settled law that the addition cannot be made solely based on third party information. Any third-party information received shall be subject to further enquiry and assessment shall be made with proper application of mind. Here it would be pertinent to refer and rely upon the ratio of the following judgment of the Hon'ble Supreme Court in the case of CIT vs. Odeon Builders Pvt. Ltd. 120191 418 1TR 315 (SC) (August 21, 2019-SC) wherein, it was held/averred, as follows by the Hon'ble Apex Court at page 319:

" We have perused the review petition and find that the tax effect in this case is above Rs. 1 crore, that is, Rs.6,59,27,298/-. Ordinarily, therefore, we would have recalled our order dated 17th September, 2018, since the order was passed only on the basis that the tax effect in this case is less than Rs. 1 crore.

However, on-going through the judgments of the Commissioner of Income-tax, the Income-tax Appellate Tribunal and the High Court, we find that on the merits a disallowance of Rs.19,39,60,866 was based solely on third party information, which was not subjected to any further scrutiny. Thus, the Commissioner of Income-tax (Appeals) allowed the appeal of the assessee stating:

Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wins of the Department, which have not been independently subjected to further verification by the Assessing Officer who has not provided the copy of such statements to the appellant, thus denying opportunity of cross-examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, and VA T registration of the sellers and their Income-tax return. In view of the above discussion in totality, the purchases made by the appellant from M/s. Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for f 19,39,60,866, is directed to be deleted

The Income-tax Appellate Tribunal by its judgment dated May 16, 2014 relied on the self-same reasoning and dismissed the appeal of the Revenue. Likewise, the High Court by the impugned judgment dated July 5, 2017, affirmed the judgments of the Commissioner of Income-tax and the Income-tax Appellate Tribunal as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the Income-tax Appellate Tribunal.

In these circumstances, the Review Petitions are dismissed."

Further from a from a perusal of the statement of various persons as relied upon by the Assessing Officer (as per Para 7 supra), it is further evident that no specific information was received against the Appellant and the name of the Appellant was nowhere referred in the corresponding Statement referred and relied upon by the AO

The AO had failed to bring on record any material which would even remotely prove any direct or even indirect acquiescence of the Appellant with the following parties, being the parties to whom M/s Silverpoint Infratech Limited had made payments:

*M/s. Argo Trade and Commerce
M/s. Wilson Projects
M/s. Elegant Constructions*

The AO had failed to bring on record any material which would further establish or even remotely prove any direct or even indirect acquiescence of the Appellant with the following parties, being the parties to whom the parties referred in the preceding paras had made payments, namely:

*M/s Shivdhan Vinimay Pvt Ltd
M/s Softlink Shoppers Pvt Ltd
M/s Everstrong Vintrade Pvt Ltd
M/s Tycoon Commosale Pvt Ltd*

It is evident that the statements of the aforesaid persons were not provided to the Appellant. Hence, these statements cannot be considered as basis for disallowing the expenses of 66,40,68,972/-. Furthermore, it is also a matter of fact that all the aforesaid statements of the third parties were recorded behind the back of the Appellant and therefore these statements could not be the basis for making the impugned disallowance.

It is evident that in the case on hand, the work awarded to the Appellant by the three (03) contract awarding parties was sub-contracted by the Appellant to M/s Silverpoint Infratech Limited. Purportedly based on some statements, the AO had inferred that the entire work carried out by M/s Silverpoint Infratech Limited was bogus. Except for these statements, there is no other material or enquiry which would even remotely suggest that the Assessing Officer had applied his mind to the facts of the matter".

28. In the above submission, ld. Counsel for the assessee has demonstrated as to how superficial information was available with the Revenue and it does not goad the ld. Assessing Officer to harbor belief that income has escaped assessment on account of failure of the assessee to disclose all material facts fully and truly

in respect of the assessment of its income. The ld. Assessing Officer has observed that in the data-base of the Income Tax Department, these seven companies are branded as accommodation providers. How these sweeping statements could help the ld. Assessing Officer to doubt the case of the assessee. It is not ascertainable when this data-base was prepared, what is the foundation of the data-base, whether any opportunity to contest, such an observation has been granted or not, not only to the assessee but to those companies, who have been branded as an entry provider. This issue had ever travelled to independent adjudicating bodies like ITAT or Hon'ble High Courts, which would have upheld that these companies were indulged in providing accommodation entries. Therefore, whatever information has been referred by the ld. Assessing Officer, it is vague and incomplete and on the basis of this information, the assessment of the assessee cannot be reopened again. Therefore, we quash the reopening of assessment and accordingly assessment order also.

29. The next fold of dispute is whether any addition deserves to be made or not. We have discussed the facts in earlier paragraphs. In paragraph no. 24 of this order, we have noticed details of certain projects, which were received by the assessee. These projects were assigned to M/s. Silverpoint Infratech Limited on back to back basis by retaining a profit margin. These details are available in the regular books of account of the

assessee and the assessee has declared a profit of Rs.2,01,96,284/- out of these contracts. The details of such profit have also been noticed by us in paragraph no. 24 of this order. The case of the Revenue is that assignment of this contract to M/s. Silverpoint Infratech Limited is to be disbelieved. The gross amount received by the assessee is to be taxed as unexplained income of the assessee. For harboring this belief, the ld. Assessing Officer has recorded the finding that M/s. Silverpoint Infratech Limited is engaged in providing accommodation entries. It has further made payments to six-seven companies, which are branded as bogus entities engaged in providing accommodation. The ld. Assessing Officer has reproduced the banking details on pages no. 5 to 9 of the assessment order. His case is that money was transferred by the assessee to M/s. Silverpoint Infratech Limited, who further transferred that money to the accounts of different companies with HDFC Bank. He further observed that those companies are Jama Kharchi Company, namely entry providing company. Therefore, this transaction of the assessee is to be treated as bogus and the gross amount is to be taxed.

30. On appeal, ld. CIT(Appeals) did not accept this finding of the ld. Assessing Officer. He was of the view that only income embedded in assignment of these contracts, are to be assessed as income of the assessee. The assessee has offered income @ 3% and @ 3.14% on the last contract. The ld. CIT(Appeals) adopted *ad hoc* rate at 6%.

31. With the assistance of Id. Representative, we have gone through the record carefully. While taking note of the submission of the Id. Counsel of the assessee on the earlier issue and noticed in paragraph no. 27, we are of the view that there is no evidence with the revenue to harbor such a belief.

32. Let us evaluate the evidence possessed by the revenue. As far as the first part is concerned, it is only ledger account of M/s. Silverpoint Infratech Limited in the books of assessee. Thereafter Id. Assessing Officer has made reference to statements of Shri Sanjay Kumar Drolia and others recorded in 2014 and 2016. Now in the proceeding, the statements were not known. The assessee was not given the copy of the statement. The assessee was not given an opportunity to cross examine those persons and how activities of the assessee are impacted by those statements has nowhere been demonstrated by the Id. Assessing Officer. He just made a general and sweeping remarks about some investigation carried out on the premises of M/s. Silverpoint Infratech Limited. The Id. Assessing Officer thereafter made reference to the Bank accounts of certain other seven companies and alleged that M/s. Silverpoint Infratech Limited has transmitted the money to these companies. He failed to establish a complete chain that money has ultimately percolated to the accounts of the assessee. This is inspite of the fact that earlier there was a scrutiny assessment, thereafter a reassessment and thereafter a search and one more

round of assessment. Thus there is no evidence possessed by the Revenue to say that contracts assigned by the assessee is a bogus transaction.

33. As far as the finding of the Id. CIT(Appeals) is concerned, that income is to be re-determined out of these contracts on *ad hoc* basis. It is pertinent to note that assessee has been maintaining regular books of account. Section 145 of the Income Tax Act provides the method of accounting required to be adopted by an Assessing Officer. Sub-clause (3) of this section would contemplate if the Id. Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, then he may reject the method of accounting or books of account, only thereafter he would proceed to estimate the income. No such steps have been taken by the authorities. The quantification at 6% is without any basis. The assessee itself has shown profit at 3% and 3.1% on last contract. This profit was not doubted in a scrutiny assessment as well as in a re-assessment proceeding. Then how it is to be disturbed in a one more of reassessment is not discernable from the finding. Therefore, the order of the Id. CIT(Appeals) justifying the additions computed at 6% of the contract receipt is not sustainable. In view of the above discussion, we summarize the result as under:-

- (a) Section 153A starts with an *non-obstante* clause, i.e. notwithstanding. Hence once a search has been conducted upon an assessee, then

notice under section 153A is must and income is to be determined according to the Scheme of this Section as explained earlier. According to the assumption of the ld. Assessing Officer, no notice required to be issued under section 153A, therefore, he cannot take action under any other section in this A.Y.

(b) Notice issued under section 148 of the Income Tax Act is concerned, it is without any sufficient reason for forming the opinion that income has escaped assessment.

(c) On merit, the addition of the gross contract receipt cannot be made without even determining whether the projects for which contracts were received by the assessee were completed or not. There is no evidence with the Revenue to demonstrate that this whole transaction is bogus and the total money was retained by the assessee. Thus gross addition cannot be made.

(d) The addition whether 6% is sustainable or not. As far as this question is concerned, the rate adopted by the ld. CIT(Appeals) at 6% of the

contract receipts is concerned, it is unsustainable because the Id. CIT(Appeals) has not assigned any specific reason as to why the method of accounting or books of account of the assessee are not acceptable inspite of the fact that in two rounds of scrutiny assessment, such accounts were not doubted.

34. In view of the above discussion, the appeal of the assessee is allowed, whereas the appeal of the Revenue is dismissed.

35. In the result, the appeal of the assessee is allowed, whereas the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 03.04.2023.

Sd/- (Manish Borad) Accountant Member Kolkata, the 3rd day of April, 2023	Sd/- (Rajpal Yadav) Vice-President
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(3) **Deputy Commissioner of Income Tax,**
Circle-1, Guwahati,

ITA No. 40/GAU/2022
Assessment Year: 2013-2014
&
ITA No. 01/GAU/2023
Assessment Year: 2013-2014
ABCI Infrastructure Pvt. Limited

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- (4) *Commissioner of Income Tax (Appeals),
Central, North-East Region, Guwahati,*
(5) *Commissioner of Income Tax- ,*
(6) *The Departmental Representative*
(7) *Guard File*
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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.