

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B" : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER  
AND  
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

ITA.Nos.877, 878, 879, 880, 881, 882 & 883 /PUN./2022  
Assessment Years 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17& 2017-2018

V M Matere Infrastructures (India) Private Limited, Gat No.62, Matere House, Sector No.24, Pradhikaran, Moshi, Pune-412 105 Maharashtra. PAN AACCV5969N	vs.	The ACIT, Central Circle- 2(4), AyakarSadan, Bodhi Towers, Salisbury Park, Gultekadi, Pune – 411037 Maharashtra.
(Appellant)		(Respondent)

ITA.Nos.913, 912, 911& 910/PUN./2022  
Assessment Years 2011-12, 2012-13, 2013-14& 2014-2015

The ACIT, Central Circle-2(4), AyakarSadan, Bodhi Towers, Salisbury Park, Gultekadi, Pune-411037 Maharashtra.	vs.	V M Matere Infrastructures (India) Private Limited, Gat No.62, Matere House, Sector No.24, Pradhikaran, Moshi,Pune-412 105 Maharashtra. PAN AACCV5969N
(Appellant)		(Respondent)

For Assessee :	Shri Nikhil S Pathak
For Revenue :	Shri M.G. Jasnani

Date of Hearing :	22.05.2023
Date of Pronouncement :	29.05.2023

## **ORDER**

### **PER SATBEER SINGH GODARA, J.M.**

The instant batch of eleven appeals pertains to a single assessee viz., V M Matere Infrastructures (India) Private Limited. All these eleven appeals i.e., four cross-appeals each filed by assessee and Revenue's behest in ITA.Nos.877, 878, 879 & 880/PUN./2022 and ITA.Nos.913, 912, 911 & 910/PUN./2022 for Assessment Years 2011-12, 2012-13, 2013-14 & 2014-20, respectively for former as many assessment years as well as the taxpayer's latter three appeals ITA.Nos.881, 882 & 883 /PUN./2022 for assessment years 2015-16, 2016-17 & 2017-2018, arise against the CIT(A)-12, Pune's common order dated 30.09.2022 in case No.PN/CIT(A)-12/10479/2018-19 & 10533, 10534, 10850, 10851, 10855 & 10852/2019-20, assessment year-wise, respectively, in proceedings u/s.143(3) r.w.s. 147/143(3) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties at length. Case files perused.

2. It emerges during the course of hearing that the assessee's seven appeals ITA.Nos.877 to 883/PUN./2022 plead its twin substantive grounds challenging validity of reopening followed by disallowance of sub-contract payment expenses amounting to Rs.4,88,33,000/-; Rs.3,41,59,000/-;

Rs.4,19,02,000/-; Rs.2,48,58,000/-; Rs.1,78,48,000/-;  
Rs.60,42,000/- and Rs.1,23,66,000/-; assessment year-wise,  
respectively, which have been partly affirmed in the CIT(A)'s  
common order. The Revenue's cross-appeals ITA.Nos.877, 878,  
879, 880, 881, 882 & 883 /PUN./2022 (supra) on the other  
hand seek to revive the Assessing Officer's addition disallowing  
the assessee's sub-contract expenses in entirety.

3. The assessee's appeal in the "lead" assessment year  
2011-12 ITA.No.877/PUN./2022 pleads the following  
substantive grounds :

*"The following grounds are taken without prejudice to each  
other - On facts and in law,*

- 1. The ld. CIT(A) erred in holding that the reasst. order  
passed u/s. 147 was valid in law without appreciating  
that the original assessment was completed u/s. 143(3)  
and since there was no failure on the part of the  
appellant company to disclose fully and truly the material  
facts in the course of original assessment and even in the  
reasons recorded there was no allegation of failure on  
part of the appellant company to disclose fully and truly  
all the material facts in the course of original assessment,  
the reopening was not justified at all and the  
reassessment order passed u/s. 147 be declared null  
and void.*

2. The Ld. CIT(A) failed to appreciate that –

a. The notice issued u/s 148 was bad in law since the all aspects of sub-contracting expenses including the 9 sub-contractors were already submitted and are on record at the time of original assessment u/s143(3) of the Act and therefore the re-assessment order u/s 147 be declared null and void.

b. The re-opening u/s 148 is based on reason to suspect and not reason to believe and accordingly the same was invalid in law.

c. The notice u/s. 148 was issued on borrowed satisfaction and no independent satisfaction was arrived at by the ld. A.O before issue of the said notice and hence, the notice issued u/s. 148 was invalid.

3. The learned CIT(A) failed to appreciate that the learned AO has not specifically addressed any of the objections to the re-opening raised by the appellant company, in the Order disposing the objections of the appellant company and erred in holding that the AO has duly complied with the procedure prescribed in the Hon. SC judgement of *GKN Driveshafts vs CIT 259 ITR 19 SC*.

4. *The learned CIT (A) erred confirming the disallowance of sub-contractor expenses to the tune of Rs.55,42,995/- without appreciating that the entire expenses incurred by the assessee were genuine and hence, there was no reason to make any disallowance on account of sub-contractor expenses.*
5. *The ld. CIT(A) erred in confirming the disallowance of sub-contractor expenses amounting to Rs.55,42,995/- even though he himself agreed that the various reasons given by the Id. A.O. for making the disallowance were not correct and accordingly, there was no reason to confirm any disallowance on account of sub-contractor expenses.*
6. *The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*

4. Learned DR invited our attention to Revenue's cross-appeal ITA.No.913/PUN./2022 for the very "lead" assessment year seeking to reverse the CIT(A)'s action under challenge as follows :

1. *“On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.4,32,90,005/- made on account of bogus sub-contract expenses booked in the name of 11 sub-contractors.*

2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.4,32,90,005/- made on account of bogus sub-contract expenses even after accepting that no details and evidences of further payments by the so-called sub-contractors out of cash withdrawn from amounts transferred by the assessee in their bank accounts for execution of sub-contracts, were submitted during the assessment as well as appellate proceedings.*
3. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the findings of inflation of expenses & debit of bogus purchase by the assessee in earlier survey actions, has erred in applying project wise Gross Profit ratio of 14% for deleting disallowance of bogus sub-contract expenses of Rs.4,32,90,005/- even though the assessee has not been able to establish genuineness of sub-contract work executed by the sub-contractors.*
4. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has failed to consider the decision of the Hon'ble Apex Court in the case of N.K. Proteins Ltd. in SLP 769/-2017 dated 16/01/2017 wherein it has been clearly held that once the expenses are bogus addition should be made of the entire expenses and not only the profit embedded in such expenses.*
5. *The appellant craves leave to add, amend or alter any ground/grounds, if necessary, as per the requirements of the case.”*

5. Both the learned representatives took us to the CIT(A)'s elaborate discussion partly affirming the Assessing Officer's action disallowing the assessee's sub-contract expenses as under :

*proceedings.*

5.5 I have considered the facts of the case as well as submissions made by the appellant. Briefly, the facts of the case and the related background is that the appellant company is engaged in civil construction business. A survey u/s 133A was conducted on the appellant on 29.09.2006. At that time, the appellant was doing business in proprietorship firm of Shri Vishnu Mahadev Matere. During the course of survey, some evidences of inflation of expenses were found and the appellant admitted additional income of Rs. 75 lakhs and Rs. 85 lakhs for the A.Y. 2006-07 and A.Y. 2007-08, respectively. For the A.Y. 2006-07, the appellant offered additional income of Rs. 75 lakhs in his return, which was accepted by the AO. However, in the A.Y. 2007-08, the AO noted that the appellant was inflating expenses and not maintaining regular books of account as well as the stock register, estimated net income of the appellant @8% of the total turnover and further added the additional income of Rs. 85 lakhs offered during the survey. The CIT(A)-V, Pune had confirmed the estimation of income vide order dated 25.2.2011 but deleted the addition of Rs. 85 lakhs as the income was already estimated @8% and the addition made so, subsumed the addition of Rs. 85 lakhs.

5.6 Another survey action u/s 133A of the Act was conducted on the appellant on 18.02.2013. During the survey, it was found that the appellant had shown bogus purchases from M/s. Rajkumar Enterprises and the appellant also admitted such bogus purchases at Rs. 80,99,023, Rs. 1,04,47,436, Rs. 25,39,589 & Rs. 1,01,69,500 for A.Y. 2010-11 to A.Y. 2013-14 respectively. The appellant had not offered these bogus purchases as income for the A.Y. 2011-12 in the return of income filed in response to the notice u/s 148 of the Act issued to the appellant, for which addition was made by the AO, which was upheld the CIT(A)-13, Pune vide order dated 04.01.2017.

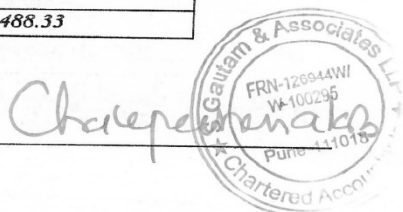
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5.7 Thereafter, yet another survey was conducted on 4.3.2017 and consequently, the case of the appellant was again reopened on the issue of bogus sub-contract expenses. During the course of survey action u/s 133A of the Act and the post survey proceedings, it was observed that sub-contracting work was given to 11 sub-contractors over the years, many of whom were employees of the appellant company at the time of awarding contracts. For these 11 sub-contractors, the standard procedure of awarding the contract was not followed. These sub-contractors also did not have machinery/equipment, specialized staff to carry out the necessary work and in some cases, they had no prior experience of the work allegedly awarded by the company and which is pre-requisite to avail the tender. They even could not justify with evidentiary documents as to what work was actually carried out by them and most of the sub-contractors were working only for the appellant. There are also circumstantial evidences such as, that money credited in their accounts has been immediately withdrawn in cash but the sub-contractors did not have corroborating documents in support of further cash payments. Also, some of the subcontractors have not filed their returns of income for the respective year. The details of such sub-contractors and the sub-contracting expenses claimed by the appellant for A.Y. 2011-12 are as below :

Sr.No.	Name of the Sub-contractors	Sub-Contract Amount debited (In Lakhs)
1	Shri Dhananjay Shivram Mhaske	51.21
2	Shri. Santosh Panditar Jondhale	24.99
3	Shri. Shivshankar Prajapati	51.99
4	Shri. Rajendra Bino Pandit	51.88
5	Shri Samir Santosh Biswas	50.96
6	Shri Sanjay B Rahane	51.36
7	Shri Vijaykumar Nagap Guttedar	50.99
8	Shri. Prakash Padale	51.34
9	Shri Ajit Narayan Prasad	51.13
10	M/s Akashdeep Transport	21.17
11	M/s. Prathamesh Transport	30.77
	Total	488.33



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5.8 Accordingly, the appellant was asked to furnish the following details during the assessment proceedings :

- i) Copy of ledger extract of the 11 subcontractors appearing in your books of accounts.
- ii) Nature of contract given to these persons.
- iii) Furnish the complete details of these sub-contractors such as name, complete postal addresses, PAN, contact no., etc.
- iv) Copy of agreements made with them, if any.
- v) Copy of invoices raised by these parties.
- vi) Details and qualifications and experience, etc having by these parties on the basis of which you have granted them subcontracts. Whether any advertisement in paper has been given by you regarding these contracts, if yes, furnish details thereof, if no advertisement given the reasons thereof.
- vii) Please produce books of accounts, vouchers, etc for verifications.

5.9 In response, the appellant filed detailed submissions, wherein the following were filed :

- i) Work orders issued by the appellant company to the sub-contractors which shows detailed work to be done and also site details
- ii) ITR returns of the sub-contractors filed
- iii) Ledger Extract of the Sub-contractors
- iv) Sample bills of the sub-contractors
- v) Running bill of the site subsequent to the contractors work completion at the site
- vi) Assessment Orders of the sub-contractors where available.

5.10 The appellant also filed arguments justifying these expenses as well effect of disallowance on G.P. and N.P. etc. These arguments are also reiterated in the submissions filed during the appellate proceedings, which have been reproduced above. However, the AO did not agree with the same and held that these purchases were not genuine and added the same to the income of the appellant. Aggrieved with the same, the appellant filed the present appeal and furnished detailed submissions, which have been reproduced above.

5.11 Similar additions related to these 11 sub-contractors have been made in subsequent years by reopening the assessments. Since facts of the case as well

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as the contractors are the same, these appeals are being decided together, with A.Y. 2011-12 as the lead appeal.

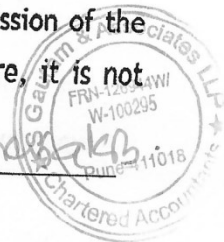
5.12 To examine the allowability of these sub-contracting expenses, it is essential to discuss all the aspects pointed by the AO, the response of the appellant and whether, the averments made by the AO are found to be correct. These issues are discussed below :

(i) **Proper procedure was not followed while awarding the contract.**

5.13 The AO had observed that the appellant had not followed any standard procedure for awarding sub-contracts to these 11 sub-contractors under consideration. Neither any advertisement was given nor official tenders were issued for multi-party bidding. On this issue, the appellant submitted that it had issued proper contracts / work orders showing detailed work to be done. Due to appellant's nature of business, a large part of work has to be sub-contracted based on jobwork. Since the appellant is a private limited company, there is no need to publish tenders / advertisements for selection of contractors. Since the appellant is doing this business for past more than 20 years, it had its network of contractors, vendors and suppliers who regularly approach the assessee company seeking work. It may be noted that the company does not engage site labour on its payroll and gets the respective job done from Sub-contractors. These sub-contractors are engaged based on past experience and capability as well as location of work. Further, there were other contractors also and the total sub-contracting expenses during the year were Rs. 1312.99 lakhs, out of which the transactions with the 11 contractors were Rs. 488.33 lakhs only. The work given to other contractors for the balance part of Rs. 844.66 lakhs was also given without any tendering or bidding process.

5.14 I have considered the contention of the AO as well the submission of the appellant. The appellant is a private limited company and therefore, it is not

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binding on it to give contracts by tendering process or by advertisements. It is seen that a large number of contractors are engaged by the appellant besides these 11 sub-contractors for different type of work at different projects and the amounts of contracts are also not very huge. These are labour based jobs as the appellant is mainly engaged in work of road or civil construction and the individual contracts are not huge. The appellant is doing business for many years and therefore, it is giving out similar type of work for these years and knows the persons as well as their capabilities while awarding the work. In these circumstances, no adverse view could be taken on this account in isolation and the explanation given by the appellant on this issue appears acceptable.

ii) **Worthiness of the contractors for skilled work**

5.15 The AO had observed that the appellant had not provided any documentary evidence to justify the worthiness of contractors for giving the work. The past experience and proven track record can only be the basis for awarding such Contract work and not the qualification in the form of Degrees from Colleges. However, the appellant could not furnish any document to prove the experience of these contractors and its claim of experience is without any evidence. He appellant submitted that the work awarded to the sub-contractors was not skilled work. Only the unskilled labour part is outsourced by the appellant and the same is also clear from the work orders filed by it. Also, the sub-contractors were also examined and their statements were recorded in the course of post survey proceedings. For such unskilled and unorganized contractors, no such evidence for experience can be produced. It was also submitted that these sub-contractors are working for it since long and in A.Y. 2008-09, some adverse view was taken against few contractors by the AO, which was deleted by Hon'ble ITAT.

5.16 I have considered the contention of the AO as well the submission of the appellant. These sub-contractors were engaged in the work of excavation, road

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work, providing Dubber, Flybrick and Burnt brick masonry, construction, laying of concrete, RCC pipes, fixing of paver block, Laying RCC and cutting & bending steel reinforcement, Transport of material etc. These are labour related job and therefore, the contention of the AO is correct that practical experience is more relevant for such work. However, the contention of the appellant is also correct that no evidence for such experience can be given. As claimed by him, he knew the capabilities of the sub-contractors being in business for so many years and many contractors were working with it for past several years. The appellant also referred to some contractors, for whom adverse view was taken by the AO regarding inflation of expenses but the same was deleted by the ITAT. The contention of the appellant is found to be correct in this regard. Therefore, no adverse view can be taken against the appellant and to this extent, his contention is correct.

5.17 However, it is relevant to mentioned here that the Hon'ble CIT(A) as well as ITAT have not deleted the addition on account of disallowance of sub-contracting expenses in A.Y. 2007-08 on merits or genuineness of expenses, but on the argument that since the profit was estimated @8%, no further disallowance can be made after such estimation.

**(iii) Genuineness of transactions/ Circumstantial evidence:**

5.18 The AO contended that to show these transactions as genuine, the appellant had actually paid the parties and may have deducted TDS, but it was seen from the bank account statements of these parties that the money received by the parties in the banks was immediately withdrawn in cash and these sub-contractors have not provided evidence of making further payment of expenses in cash. Therefore, the cash which was immediately withdrawn, may possibly have been returned to the appellant. The appellant has contended on this issue that no evidence of return of cash was found and such suspicion is without any evidence. Further the sub-contractors were summoned and examined by the

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Investigation team, wherein all the details and documents called for were submitted and the contractors have attended in person before the authorities and admitted of doing the work and receiving payments. No contrary evidence was filed by AO. Moreover, all related evidence of work done was filed by it but no evidence negating these sub-contracting work and payments thereon could be pointed out by the AO.

5.19 I have considered the submission of the appellant. The arguments of the appellant are found to be correct as no evidence of return of cash was found. Further, practically also, since the sub-contractors are shown to be engaged in the labour intensive work, almost all payments are made to labour by the sub-contractors and therefore, the immediate cash withdrawals for making payments to them also seems very logical. Therefore, the contention of the appellant in this regard also appears to be correct to this extent. However, the fact remains that no further evidence of payment to labour was submitted by the sub-contractors. At the same time, the PAN of all sub-contractors were provided by the appellant and the assessments of some of them were also completed, wherein no adverse inference is made and the income shown by the sub-contractors including income from sub-contracting work was accepted, which also substantiates the version of the appellant.

**(iv) Consistency of submissions made by the contractors as well as the assessee:**

5.20 In this regard, the AO observed that it was mentioned that the subcontractors were employees of the assessee company when the contracts were given. The assessee, in its submission, did not differ with the same but claimed that the contractors were past employees. But in this regard no proof was submitted such as employment records. In this regard, the appellant submitted that it is a common practice to have the head of the contractors as representative employees of the company since it is crucial to the execution of

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the contracts and dealings with various authorities on the site. It is further stated that 6 out of the 11 contractors were employees of the company and all have filed their returns of income. Even out of these 6 contractors, 3 of them have been assessed u/s 143 r.w.s. 147 of the Act, where the AO has assessed both the salary income and the business income of the contractors. Therefore, this issue cannot be a reason to doubt the genuineness of the work done and it is only a baseless suspicion.

5.21 I have considered the findings of the AO as well as the submissions made by the appellant. The issue is, whether any adverse inference can be drawn against the appellant for keeping such head of labour/contractor as an employee in the company to keep control and execution of contracts. Apparently, there is no purpose of employing such person as he would, in any case, keep providing services even if not an employee as ultimately, the appellant is a customer for the sub-contractor and the appellant is to make payment for services received from the sub-contractor. So in any case, the appellant would have control over the sub-contractor, whether he is an employee or not but yes, if he is an employee, the control would be higher. However, at the same time, can an adverse view be taken if the assessee employs this business model of keeping under employ the head on labour/ sub-contractor, which the assessee finds more effective for execution of contracts and to keep control. Evidently no, in absence of any legal bar as such. However, at the same time, such control may result into less independence for the sub-contractor, which may also lead to unethical practices like inflated bills etc.

**v) Norms regarding labour component in work contracts:**

5.22 The appellant had also raised an issue that the labour component in the works contracts executed by him should be at least 30% of the contract value and relied on the service tax notification and other provisions in this regard, where this presumption was made as per its claim. However, the appellant has

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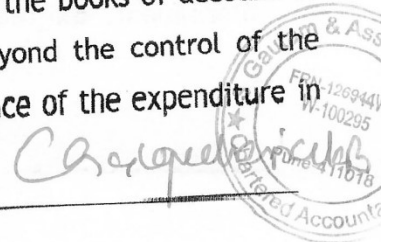
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filed contractwise details for A.Y. 2011-12 to 2017-18, wherein disallowance of sub-contracting expenses was made and the appeal were filed, which are being decided in this order. It is seen from these details that in the case of the appellant, these labour charges varies from 11% to 46% of the contract value over the years for road projects while for construction projects, these ranged from 8% to 28%. For A.Y. 2011-12 itself, these ranged from 20% to 35% with most of the contracts with less than 30% sub-contracting charges. Therefore, 30% is only a presumptive value and this argument taken by the appellant is not correct.

vi) **Assessments in the cases of the Sub-contractors:**

5.23 The AO contended that the contention of the appellant that in three cases of sub-contractors returned income has been accepted by the concerned AOs for AY 2011-12, hence addition in its case cannot be made, is not acceptable. The filing of return of income by sub contractors is nothing but a colourable device given to these transactions by the appellant to arrange these transactions in such a way that the same would appear genuine. Further, from the orders passed by the other AO, it is not clear whether books of accounts and other related documents were examined by them or not, for the sub-contractors. In one of the sub-contractor case namely Shivshankar Prajapati, even he had not filed any return of income and he has filed his return of income only after issue of notice u/s 148 and shown the profit u/s 44AD of the Act. In such a situation it is very difficult to treat all these sub-contract payments as genuine. In this regard, the appellant submitted that all the sub-contractors were regularly filing the return of income. The copies of the same were provided to the ITD in the post survey proceedings. Also post survey the contractors were issued notices u/s 148 of the Act and the copies of their assessment orders were also submitted, in the course of 143(3) proceedings, to the AO. The maintenance of the books of account of any contractor, or any vendor for that matter, is beyond the control of the appellant company and cannot be a basis of disallowance of the expenditure in



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the case of the appellant company. Besides it is presumed that all these facts were verified in the course of the assessment proceedings of the contractors, on the basis of which their returned income was accepted. It was also contended that the observation of the AO that the filing of the return by the contractors is a "colorable device" to the transactions made by the appellant is not correct as there were 5 such sub-contractors, who were not employees of the appellant and also the fact that the contractors were also assessed u/s 147 post the survey, wherein the Department has acknowledged the activities and also contract income reported by the sub-contractors, which are contradictory. Also, the action of the AO in doubting the judgement and assessments done by the other fellow AO's is ironical considering the fact that 2 of the assessments u/s 147 of the Act in the case of Prathamesh Transport and Shri. Shivshankar Prajapati were being done in the very same Income Tax Office (Ward 8(1) and Ward 8(3)) where the assessment of the appellant was being done. The learned AO could have discussed with the concerned AO of the sub-contractors and could have even accessed the assessment records.

5.24 I have considered the submissions of the appellant. It is seen that almost all contractors have filed their return of Income. One of the sub-contractor, Shri Shivshankar Prajapati did not file the return but he was issued notice u/s 148 of the Act. Assessments were made in four cases where returned income was accepted by the AOs. Further, it is seen that these cases were reopened by the AOs on the basis of information received from the appellant's case, even then these AOs accepted the returns filed by the sub-contractors. The AO has referred to the case of Shri Prajapati, but in that case, the AO had stated that Shri Prajapati filed Bank statement, computation of income, copy of Audit report, P&L and Balance Sheet. The AO further referred to its financials while accepting the returned income. In other cases, the returns were already filed and in assessment, the returned income was accepted. Therefore, adverse comments

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made by the AO in this regard were found to be without any basis and contrary to facts.

vii) Discrepancies in the Income tax returns filed by the sub-contractors  
5.25 The AO had observed in para 5 of the order that out of the 11 sub-contractors, there were 5 contractors who have either not filed any return of income for the AY 2011-12 or have shown receipts of same amount/less than the receipts they claimed to have received from the appellant. The said parties are as under: -

Sl No.	Names of the Sub-contractor	Sub-contract Amount as per ledger (in lakhs)	Receipt Amount as per ITR (in lakhs)
1	Shri Santosh P Jondhale	24.99	64.46
2	Shri Shivshankar Prajapati	51.99	0
3	Shri Rajendra Bino Pandit	51.88	Non-filer
4	Shri Prakash Padale	51.34	51.86
5	M/S. Prathamesh Transport	30.77	0

5.26 In this regard, the appellant submitted the explanation as below

Sr. No.	Name of the Sub-contractors	AO's comments in the Order and Appellants submission		
		Sub-Contract Amount as per Ledger (In Lakhs)	Receipt Amount as per ITR (In Lakhs)	Appellants Submission
1	Shri. Santosh P Jondhale	24.99 ✓	64.46 ✓	The contractor was assessed and as per the Order the contract receipts were INR 24.99 Lakhs and duly verified. Also the assessed income was higher than the transactions with the appellant company.
2	Shri. Shivshankar Prajapati	51.99	0	The contractor was assessed and as per the Order the contract receipts were INR 51.99 Lakhs and duly verified. The return as per the ITR was INR 4,25,621/- . The observations of the AO are erroneous.

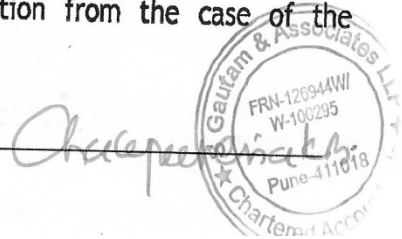


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3	Shri.Rajendra Bino Pandit	51.88	Non-filer	The contractor had filed his return of income on 22.09.2011 declaring a net income of INR 6,18,452/-. The AO's observation that the contractor is a non-filer is incorrect
4	Shri.Prakash Padale	51.34	51.86	The receipts shown in the ITR are in line with the transactions with the appellant and the copy of the ITR is on record.
5	M/s. Prathamesh Transport	30.77	0	The contractor had filed original return on 27.05.2011 and was assessed and as per the Order the contract receipts were INR 30.77 Lakhs and duly verified. The AO's observation is apparently incorrect.

5.27 I have considered the facts of the case. In respect of parties at S. No. 1 and 4, if the sub-contract receipts shown by the sub-contractor is more than the amount paid by the appellant, in my opinion, it is not a discrepancy. Further, the assessment of the party at S.No. 1 was made and no adverse findings were given and the income was accepted. In respect of the party at S. no. 3, the AO had contended that he did not file return, but this observation is found incorrect. Moreover, for cases at S. No. 2 & 4, as per the contention of the AO, the receipts in ITR were shown at Nil while in both the cases, assessments were made and their AOs also examined the contract receipts, as mentioned specifically in the their assessment orders and accepted the income shown by the parties. It is also relevant to mention here that these assessments were made after reopening the cases, on the basis of the information of the transactions, claimed to be undertaken by the appellant with these parties, was forwarded to their AOs. It further shows that there was no such discrepancy as pointed out by the AO in para 5 of the assessment order. Further, as mentioned above, the appellant filed the income tax details including PAN and copy of acknowledgement of filing return before the AO at the time of assessment proceedings and also, assessments in some of these cases were made after reopening the cases after receiving the information from the case of the



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appellant, but the income shown by the sub-contractors were accepted without any adverse inference and it was specifically mentioned by the AO that, while passing the order, he had gone through the Bank statement, computation of income, P&L, Balance Sheet etc. Moreover, all discrepancies mentioned by the AO in this case, have been found incorrect.

viii) Effect on GP and NP due to disallowance made :

5.28 The AO stated that the appellant had given the details of expenses of last 4 years and tried to impress that if the sub-contract payments were reduced from the expenses, the unreal GP will reflect. However, out of total sub-contract expenses of Rs 1312.99 Lakhs, only sub-contract of Rs. 488.33 Lakhs have been treated as non-genuine and no doubt was raised on the entire sub-contract expenses. Further, the consequent GP ratio and NP ratio after adding Rs.488.33 Lakhs, at 24.4% and 18.1%, respectively, cannot be said as unreal or abnormal considering overall factual position of the case. In this regard, the appellant submitted that its Gross Profit is as under:

Assessment Year	Turnover (Rs. In Crs)	Gross Profit (Rs. In Crs)	GP Ratio
2009-10	48.93	7.14	14.59%
2010-11	51.55	7.34	16.18%
2011-12	47.00	8.50	18.09%

5.29 The appellant submitted that this GP is before depreciation, as per the audit report and after depreciation, the GP would be 14% for A.Y. 2011-12. The appellant submitted that after considering the disallowance of sub-contracting expenses, GP ratio after depreciation would be 24% while the NP would be 18%, which is abnormally high. The appellant had also given the Gross & Net Margins of previous years prior to AY 2011-12, which are as under:

Assessment Year	Turnover (Rs. In Crs)	GP Ratio (Before Depr.)	NP Ratio
2007-08	27.06	10.45%	4.2%
2008-09	46.17	9.83%	5.6%
2009-10	48.93	14.59%	7.4%



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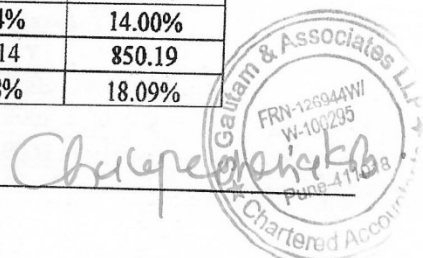
2010-11	51.55	16.18%	7.9%
2011-12	47.00	18.09%	7.8%

5.30 The appellant further stated that the gross margins of the company have never exceeded 16% and both the Gross and Net margins for AY 2011-12 are considerably higher in AY 2011-12. It was further argued that for AY 2007-08, the income of the appellant was restricted at 8% of the turnover and any disallowances or addition were restricted to the total income being assessed at 8%, while after the disallowance made by the AO, the NP would be at 18.4%, which is abnormally high.

5.31 I have considered the facts of the case and the submission of the appellant. The argument of the appellant appears to be correct since the NP shown by it is 7.8%, which is close to the generally accepted profit of 8% for construction contracts, which is taken for presumptive taxation and even applied to the case of the appellant for A.Y. 2007-08, wherein the books of the appellant were rejected. Though it may be higher than this, but it gives a fair idea of expected profits from such contracts. It is seen that the GP and NP ratios before and after the adjustments made by the AO are as under :

Rs. in lakhs

	AY 2009-10	AY 2010-11	AY 2011-12
Net Sales	4893.32	5155.98	4700.29
Direct Expenses			
1) Cost of Material Consumed			
Construction Material	1832.18	1461.78	1513.12
Diesel, Oil & LDO	492.98	297.66	333.49
2) Employees Cost	219.63	347.68	318.23
3) Sub-Contracting Charges	1082.65	1304.97	1312.99
	22.13%	25.31%	27.93%
4) Transport & Octroi Charges	363.67	277.45	287.73
5) Other Direct Expenses	403.87	450.35	578.72
6) Depreciation	172.52	192.97	192.22
Total Cost of Construction	4352.14	4514.81	4042.32
% of Cost of Construction to Turnover	88.9%	87.6%	86.0%
Gross Profit after Depreciation	541.18	641.17	657.97
	11.06%	12.44%	14.00%
Gross Profit before Depreciation	713.69	834.14	850.19
Reported in Tax Audit Report	14.59%	16.18%	18.09%



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Administration Expenses	59.91	75.96	99.72
Selling Expenses	7.47	4.01	12.73
Interest	141.11	180.62	232.24
2) Less: Other Exp/Deduction.	-5.50	2.45	-11.68
Net Other Income / Exp.	31.82	26.66	51.19
Net Profit	364.50	407.25	364.47
	7.45%	7.90%	7.75%
Disallowed Sub-Contracting Charges			488.33
<b>After Considering Contractor Disallowances</b>			
Revised Labour Cost %age	22%	25%	18%
Revised Gross Profit	11.06%	12.44%	24.39%
Revised Net Profit	7.45%	7.90%	18.14%

5.32 Therefore, after considering the disallowance made by the AO, the GP ratio would be very high at 24.39%, which is abnormally high compared to earlier years. Similarly, the NP ratio would be more than 18%, which is abnormally high, even from generally accepted profits and also from the NP in the earlier years, which never exceeded 8%. Therefore, this argument of the appellant is found to be correct and cannot be ignored.

5.33 Besides the above, the appellant has submitted the contractwise details of revenues and expenses and the consequent projectwise gross profit. The details filed by the appellant are reproduced below. For convenience of display due to space constrains of the page, only the projects where the sub-contractors under consideration have worked are given below, alongwith the overall details of the appellant.

	Akurdi Site : PCNTDA Bldg.	Aundh- Rawet Rd PCMC Sec-V	Aundh- Rawet Rd.- PCMC Sec.IV	Bopkhel Site PCMC	Moshi (Central Quarry & Stone Crushing Plant)	Indira Gandhi ROB to Neharunagar	Total (for all contracts during the year)
Nature of Work	Civil Construction	Road	Road	Pipe Laying	Common	Road	
SALES	7,31,84,656	14,35,82,589	5,93,74,828	1,66,16,031	-	2,76,16,701	47,00,29,049
DIRECT EXPENSES							
1) Purchase of Material	3,35,44,806	2,77,51,844	9,31,231	41,02,073	3,10,16,094	1,89,665	10,17,86,586
- Direct Site Purchases	-	-	2,32,34,795	-	-	66,88,677	4,95,25,380
- Moshi Plant Allocation	-	1,43,58,259	-	-	-	-	3,10,16,094
- Diesel, Oil & LDO	-	-	-	-	-	-	-

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(Site)					3,33,49,034		3,33,49,034
- Diesel, Oil & LDO (Moshi)	36,59,233	1,14,86,607	23,74,993	16,61,603		22,09,336	3,33,49,034
	-	-	-	-		-	3,18,22,891
2) Employees Cost	49,54,901	97,21,129	40,19,919	11,24,973		18,69,764	
3) Sub-Contracting Charges	2,14,97,692	4,27,96,627	2,05,26,301	54,99,480	1,58,22,242	76,63,062	13,12,98,853
%age to sales	29.37%	29.81%	34.57%	33.10%		27.75%	27.93%
- 11 Specific Contractors	1,53,95,291	76,35,276	19,34,311	51,88,590	1,58,22,242	38,62,683	4,98,38,393
- Moshi Plant Allocation*	29,27,386	43,07,478	-	-		11,83,745	1,58,22,242
- Other Contractors	31,75,015	3,08,53,873	1,85,91,990	3,10,890	-	26,16,634	7,75,35,668
- Back to back contract	-	-	-	-	-	-	39,24,792
4) Transport & Octroi Charges	44,80,026	87,89,462	36,34,652	10,17,157		16,90,567	2,87,73,005
5) Other Direct Expenses	90,10,806	1,76,78,498	73,10,481	20,45,836	5,78,71,972	34,00,286	5,78,71,972
6) Depreciation	29,92,873	58,71,784	24,28,123	6,79,510		11,29,380	1,92,21,754
Add: Opening Work In Progress	14,39,772	-	-	-		-	33,41,727
Less: Closing Work In Progress	2,18,18,182	1,09,09,091	1,27,27,273	13,63,636		-	
Total Cost of Construction	5,97,61,927	12,75,45,120	5,17,33,223	1,47,66,996	13,80,59,342	2,40,81,186	40,42,31,652
Gross Profit	1,34,22,729	1,60,37,469	76,41,605	18,49,035		35,35,515	6,57,97,396
Gross Profit %	18.34%	11.17%	12.87%	11.13%		12.80%	14.00%
* Moshi is the Central Quarry and Crusher plant. All the stone & sand used in the projects is produced & transported to all sites. This is apportioned based on consumption, dispatches & challans							
Adjusted Gross Profit & labour cost after considering the disallowances made by AO							
Without Considering the 11 contractor expenses	3,17,45,406	2,79,80,223	95,75,916	70,37,625		85,81,943	11,46,30,396
Labour Cost to Sales	4.34%	21.49%	31.31%	1.87%		31.08%	24.39%

5.34 It is seen from the above that if the sub-contracting charges claimed on account of 11 contractors are considered as bogus, and not allowed, the labour cost in some of the contracts would be abnormally low. For the Akurdi Site: PCNTDA Building contract, it would reduce to 4.34% from 29.37% claimed by the appellant. Similarly, for Bopkhel Site PCMC, it would reduce to 1.87% from 33.1% shown by the appellant while for the Indira Gandhi ROB to Neharunagar Road project, it would reduce from 27.75% to 9.47%. Further, the labour charges shown by the appellant is close to overall labour work percentage of 27.93%.

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Therefore, it is clear from the above that the disallowances made by the AO would lead to abnormal results in these projects. Moreover, these disallowances would result into GP ratio of 43.34%, 42.35% and 31.08% for these three projects, which is abnormally high and the overall GP ratio would be 24.39%, while it has never been higher than 14% in earlier years. Therefore, the contention of the appellant that these disallowances would lead to abnormal results is found to be correct.

5.35 In view of the above discussion, it is seen that almost all grounds taken by the AO for treating the sub-contracting expenses in respect of these 11 parties were found to be not correct. Moreover, the disallowance made by the AO would lead to abnormal results, as discussed above. Only issue which has some validity against the appellant is that these parties could not provide any evidence of further payments made to labour or other expenses at the time of survey. However, the appellant contended that all these parties were examined in the post-search proceedings and no adverse finding is there. Further, in the three surveys conducted in the case of the appellant, no document showing return of cash back to the appellant was found and all these parties have admitted of doing the sub-contracting work for the appellant. In fact, there was a fourth survey action u/s 133A of the Act also on 20.04.2019 and in this action also, no such evidence of receiving cash back from such sub-contractors was found. Also, in some of these cases, assessments were also made of these parties and there also, no adverse view was taken. Further, the appellant filed all details of the transactions with these parties and no shortcomings were pointed out. Though the points raised by the appellant are valid but the fact remains that the appellant is making payments to these parties, 6 of which were employees of the appellant. Though the rationale given by the appellant regarding more control over the work done by the sub-contractors and fast execution of projects thereon appears to be valid but this control may also lead to inflated billings of expenses through the same. Further, in the first survey in 2006, the evidences of

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inflated billings were found, which were also admitted by the appellant and even assessment of the A.Y. 2007-08 was completed by estimating the income of the appellant @8% of the turnover. Therefore, for the subcontractor, being an employee also, it is a type of related party transaction and accordingly, the same is to be considered on the principle of arms length. Moreover, though assessments were also completed in few of these cases of sub-contractors, the fact remains that they could not file the details of further payments made for expenses from the cash withdrawals. Taking all these facts into consideration, though the basis for disallowances made by the AO for these expenses claimed by the appellant is found to be not correct considering that observations made by the AO for making disallowances were found incorrect, no evidence of cash back to the appellant from these sub-contractors was found and the disallowance made would lead to abnormal results as well as other factors discussed above, it is also a fact that these sub-contractors could not give details of further payments, evidences of inflation of expenses were found in the earlier survey in the year 2006, and many of these sub-contractors were employees of the appellant, leading to enhanced control of the appellant and since these transactions are a sort of related party transactions, there is possibility of inflated expenses, which was also found in earlier years and therefore, these transactions are to be considered on the principle of arms length. Taking a holistic view of the situation and considering all the facts discussed above, in my opinion, no adverse view is to be taken for the contracts, where the subcontracting work was also done by these sub-contractors but the appellant had shown GP ratio higher than the overall GP ratio. However, for those contracts, where the appellant had shown expenses for these sub-contractors and the appellant had shown lower GP ratio than the overall GP ratio, the disallowance to the extent of difference in GP is to be upheld. The disallowance for these sub-contracts is to be re-computed accordingly.

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5.36 For determination of the disallowance, the contracts where these sub-contractors expenses were claimed are examined. It is seen that for Akurdi Site : PCNTDA Building contract, the appellant had shown GP ratio of 18.34%, which is much higher than the overall GP ratio of 14% shown by the appellant and therefore, no adverse inference for this contract is taken. However, for the other four contracts, the Aundh-Rawet Rd PCMC Sec-V, Aundh-Rawet Rd.-PCMC Sec.IV, Bopkhel Site PCMC and Indira Gandhi ROB to Neharunagar contracts, G.P. ratios of 11.17%, 12.87%, 11.13% and 12.80% are shown, which are lower than the overall GP ratio of 14%. Therefore, the difference of G.P. is considered for disallowance and accordingly, the disallowance for these contracts of Aundh-Rawet Rd PCMC Sec-V, Aundh-Rawet Rd.-PCMC Sec.IV, Bopkhel Site PCMC and Indira Gandhi ROB to Neharunagar contracts are determined at Rs. 40,64,093/-, Rs. 6,70,871/-, Rs. 4,77,209/- and Rs. 3,30,823/-, respectively with total disallowance of Rs. 55,42,995/-. Therefore, the disallowance to the extent of Rs. 55,42,995/- on account of these sub-contracting expenses is upheld and the AO is directed to delete the remaining addition of Rs. 4,32,90,005/-. These grounds of appeals raised by the appellant are partly allowed.

6. It is in this backdrop of facts that both parties have raise their respective pleadings wherein the assessee's twin substantive grounds (supra) challenge validity of the reopening as well as the impugned sub-contract expenditure disallowance and the Revenue seeks to revive the Assessing Officer's action disallowing the entire sub-contractual expenses. Mr. Pathak stated at the outset during the course of

arguments that the assessee does not wish to press for its former legal ground. Rejected accordingly.

7. This leaves us with the sole surviving issue of disallowance of sub-contract expenses. Mr. Pathak has placed on record the assessee's detailed submissions as under :

- 1] The assessee is engaged in civil contracting business. The assessee undertakes basically construction of roads ,bridges, flyovers and other civil infrastructure projects. There was a survey action on the assessee on 04.03.2017. According to the learned A.O., there were certain discrepancies found with respect to the sub-contractors of the assessee. In the asst. order, the learned A.O. on page 2 has referred to the list of 11 sub-contractors. The names of the sub-contractors in respect of which the alleged discrepancies were noted by the learned A.O. are as under –
  - i. Shri Dhananjay Shivram Mhaske
  - ii. Shri Santosh P Jondhale
  - iii. Shri Shivshankar Prajapati
  - iv. Shri Rajendra B. Pandit
  - v. Shri Samir Santosh Biswas
  - vi. Shri Sanjay B. Rahane
  - vii. Shri Vijaykumar Nagap Guttedar
  - viii. Shri Prakash B. Padale
  - ix. Shri Ajit Narayan Panmand
  - x. M/s. Akashdeep Transport
  - xi M/s. Prathamesh Transport
- 2] The learned A.O. in the asst. order has referred to the fact that the assessee was not following any standard procedure in respect of the contracts awarded to the above referred sub-contractors. He has further stated that some of the sub-contractors were employees of the assessee. They did not have machinery or the equipment and the specialised staff to carry out the work. He has also mentioned that in some cases, the sub-

contractors did not have prior work experience and the contracts were awarded by the assessee without issuing any tenders.

- 3] The learned A.O. has also mentioned that these sub-contractors did not have documentary evidence to prove actual work was carried out. It is also stated that circumstantial evidence in the form of money being credited and immediately withdrawn in cash was found. For AY 11-12 as an instance, the learned A.O. further notes that out of the 11 sub-contractors, five of the sub-contractors had not filed their returns or had shown receipts same or less than the receipts claimed to have been paid by the assessee. The following chart has been given by him on page 9 of the asst. order –

*(ii) Out of the 11 sub-contractors, there were 5 contractors who have either not filed any return of income for the A.Y. 2011 – 12 or has shown receipts same amount / less than the receipts they claimed to have received from the assessee company. The said parties are as under –*

<i>Sr. No.</i>	<i>Names of the sub-contractor</i>	<i>Sub-contract amount as per ledger (in lakhs)</i>	<i>Receipt Amount as per ITR (in lakhs)</i>
1	<i>Shri Santosh P Jondhale</i>	<i>24.99</i>	<i>64.46</i>
2	<i>Shri Shivshankar Prajapati</i>	<i>51.99</i>	<i>0</i>
3	<i>Shri Rajendra Bino Pandit</i>	<i>51.88</i>	<i>Non-filer</i>
4	<i>Shri Prakash Padale</i>	<i>51.34</i>	<i>51.86</i>
5	<i>M/s. Prathamesh Transport</i>	<i>30.77</i>	<i>0</i>

- 4] Accordingly, the learned A.O. has disallowed the entire amounts paid by the assessee to these 11 sub-contractors for A.Ys. 2011 – 12 to 2017 – 18.

Sr. No.	Name & PAN	Rs. In lacs
1	Shri Dhananjay Shivram Mhaske	51.21
2	Shri Santosh P Jondhale	24.99
3	Shri Shivshankar Prajapati	51.99
4	Shri Rajendra Bino Pandit	51.88
5	Shri Samir Santosh Biswas	50.96
6	Shri Sanjay B Rahane	51.36
7	Shri Vijaykumar Nagap Guttedar	50.99
8	Shri Prakash Padale	51.34
9	Shri Ajit Narayan Panmand	51.13
10	M/s. Akashdeep Transport	21.71
11	M/s. Prathamesh Transport	30.77
	<b>Total Amount</b>	<b>488.33</b>

- 5] The learned CIT(A) has given part relief to the assessee. The relevant operative paras start from page 34, para 5.12. As regards, the issue of proper procedure being not followed by the assessee for allotting the work to these 11 sub-contractors, it was clarified before CIT(A) that there are other sub-contractors as well and the assessee has not followed any system of issuing tenders before allotment of work. It was also stated that the assessee is a private limited company and there is no legal requirement to give the contracts by tendering process or through advertisement. Accordingly, he has held that no adverse inference could be drawn against the assessee on the ground that no proper procedure was followed while allotting work to the sub-contractors.
- 6] As regards, the objection of the A.O. of the worthiness of the sub-contractors for the skilled work, the learned CIT(A) has appreciated that these sub-contractors are engaged in excavation work, providing Dubber, fly brick, laying RCC, transport of material, steel reinforcement, etc. The assessee had clarified that most of the sub-contractors are working for last several years and hence, the capabilities of these sub-contractors was known. Most of the work are unskilled and the assessee had also



submitted related work orders to prove its case. Accordingly, the assessee stated that the concerned sub-contractors had the relevant skillsets to perform the work and there was no merit in the contention of the A.O. The learned CIT(A) has accepted the claim of the assessee on this issue.

- 7] As regards, the objection of the learned A.O. that the sub-contractors have withdrawn cash, the assessee had clarified that the sub-contractors were summoned and they had admitted of rendering service to the assessee. It was further stated that the sub-contractors are engaged in labour incentive work and the payments are required to be made to labour. The learned CIT(A) has accepted the claim of the assessee. He has simply because cash has been withdrawn is no ground to hold that the sub-contractors are non-genuine. The learned CIT(A) has also noted that the assessments. or some of the sub-contractors were completed and no adverse inference was raised in their cases.
- 8] The learned CIT(A) has further noted that the assessments. of some of the sub-contractors were completed and no addition was made. It is to be appreciated that the assessments. were reopened after the survey proceedings were conducted in the case of the assessee and no additions were made. The learned CIT(A) has appreciated the fact that the assessments. of the sub-contractors were reopened after the survey proceedings in the case of the assessee. The learned A.O. in those cases has accepted the fact that the sub-contractors have worked for the assessee and the income from the sub-contracting activity has been accepted. As regards, the allegation of the learned A.O. that 5 out of 11 sub-contractors had either not filed the returns or shown lesser or same amount of receipts than the receipts claimed to have received by the appellant, the learned CIT(A) in para 5.27 has dealt with the said issue.
- 9] Firstly, in respect of Shri Santosh P. Jondhale and Prakash Padale, the learned CIT(A) has stated that the sub-contract receipts shown by them is more than the amount paid by the assessee to the said parties. As regards, Rajendra Bino Pandit, the learned A.O. had stated that he had not filed the return. The learned CIT(A) has clearly held that the said person had filed his return and the observation of the A.O. was incorrect. As regards, Shri Shivshankar Prajapati and M/s. Prathamesh Transport, the learned CIT(A) has stated that according to the A.O. these persons had shown NIL receipts in their returns while the assessments. or the said two persons were completed and the contract receipts were duly shown by



them in their returns and the same were accepted in their respective assessments. Accordingly, the learned CIT(A) has noted that there is not much merit in the contention of the A.O. and the addition made on these grounds is not correct.

- 10] Thus, the learned CIT(A) has basically held that there is no merit in the various points raised by the learned A.O. for making the disallowance. He has further appreciated that in case, the disallowance is made in respect of the entire amount paid to these 11 sub-contractors, the resultant GP and NP of the assessee would work out to very high percentage which is not possible in this line of business. He has further stated that considering the disallowance made by the A.O., the GP and NP ratios would be abnormally high as compared to earlier years.
- 11] Finally, the learned CIT(A) in para 5.35 of his order has observed that almost all the grounds taken by the learned A.O. for making the disallowance are found to be incorrect. Further, there was no evidence found that any cash was received back by the assessee from these 11 sub-contractors. He has also stated that the disallowance made by the A.O. would lead to abnormal profitability. Thereafter, he states that considering the fact that some of the sub-contractors were employees of the assessee and some inflation of expenses cannot be ruled out. Accordingly, he has worked out the disallowance by considering overall Gross Profit shown by the assessee. For A.Y. 2011 – 12, the overall gross profit percentage shown by the assessee was 14%. Thereafter, the learned CIT(A) has considered the various projects undertaken by the assessee. There are some projects wherein the assessee has debited the payments made to the above referred 11 sub-contractors and there are also a few projects wherein the payment made to 11 sub-contractors has not been debited.
- 12] Now, the learned CIT(A) holds that in respect of the projects wherein the assessee has debited payments made to the 11 sub-contractors and where the gross profit percentage shown is more than over all gross profit of 14% for A.Y. 2011 – 12, no disallowance in respect of such projects is warranted. However, in case, the gross profit is less than 14%, the learned CIT(A) has directed to make the addition of the difference between the overall gross profit percentage of the assessee and the gross profit percentage shown in the respective projects. It is also to be appreciated that in case of projects where no expenditure has been debited pertaining to these 11 sub-contractors and even if the gross profit



- margin in those projects is less than 14%, no disallowance has been made by the learned CIT(A). On the above basis, the learned CIT(A) has worked out the disallowance for the various years.
- 13] The assessee submits that the addition confirmed by the learned CIT(A) is not justified at all. As clarified earlier, none of the reasons given by the learned A.O. for making the disallowance does not have any merit. The assessee has successfully demonstrated that no disallowance is warranted and the reasons given by the learned A.O. do not have any merit. Further, the method adopted by the learned CIT(A) for confirming the disallowance is also not correct. He has restricted the disallowance in respect of those projects wherein expenditure has been debited on account of payment made to the 11 sub-contractors and the gross profit declared is lesser than over all gross profit shown by the assessee. The assessee submits that there are also other projects wherein the gross profit shown in those projects is less than overall gross profit percentage shown by the assessee. In respect of such projects, no disallowance is made because there is no payment debited relating to. these 11 sub-contractors. Accordingly, the basis adopted by the learned CIT(A) is also not correct.
- 14] In view of above, the assessee submits that no disallowance is warranted on account of the payments made to these 11 sub-contractors. The assessee reiterates that all the payments made to them are genuine. Further, since some of the cases of the sub-contractors, the assessments. have been completed post survey proceedings and no adverse view has been taken also supports the case of the assessee. Thus, it is submitted that no disallowance is required to be made in respect of the payments made to these 11 sub-contractors. Without prejudice, the assessee submits that it is in the business of contracting. As per section 44AD, net profit percentage of 8 % is considered reasonable. Now, in the case of the assessee, the turnover is much higher than the limit prescribed in section 44AD. However, the assessee places reliance on the following decisions wherein it has been held that in case of estimation of profit, in such a line of business, the net profit can be estimated @ 8% of the total turnover. The assessee places reliance on the following decisions –
- a. CIT v. Subodh Gupta [54 taxmann.com 343 (Delhi) (HC)]
  - b. CIT v. Kailash Kacchawaha [293 ITR 449 (Raj) (HC)]
  - c. G. Raja Gopala Rao. V. Dy. CIT [78 taxmann.com 61 (Vishakhapatnam -Trib)]



15] Accordingly, without prejudice to the contention of the assessee that no disallowance is warranted, the assessee submits that in case any disallowance is to be made the same can be restricted to 8% of the total turnover. Thus, in respect of those years, wherein the assessee has shown net profit percentage of more than 8%, no disallowance is warranted.

8. Mr. Jasnani on the other hand has highlighted the Assessing Officer's detailed reasoning *inter alia* observing that the assessee had failed to prove genuineness of its impugned sub-contractual expenses during the course of survey and thereafter in assessment proceedings. And that all these eleven recipient parties had turned-out to be the assessee's employees only wherein they had been awarded sub-contract works in civil construction without following any due procedure. The Revenue's further case is that not only their bank accounts had witnessed cash withdrawals immediately after cash payments but also some of these eleven parties had not been found to have even declared the corresponding income derived in their respective returns. Mr. Jasnani has taken pains to file a detailed compilation of the entire records in the instant cases during the course of survey as well as all these seven assessments. He took us to the survey statement of assessee's Managing Director Mr. Vishnu Madhav Matere dated 05.03.2016 failing to prove the genuineness of the impugned sub-contractual expenditure claims.

9. We have given our thoughtful consideration to the foregoing vehement rival stands. We first of all observe that sec.292C of the Act envisages that any material found or seized during the course of search or a survey, as the case may be, carries presumption of correctness *qua* contents thereof. This is also followed by CBDT's landmark circulars dated 10.03.2003, reiterated on 15.12.2014 that the departmental authority's ought to collect actual evidence than admissions or confessions made by the concerned parties. The Board has clarified in very much unambiguous terms therein that any such admissions or confessions made by the parties concerned during a search or a survey hardly carries any significance in absence of the evidence collected by the departmental authorities. We keep in mind all these settled propositions and proceed to examine the combined records of all these eleven cases. We make it clear that the Assessing Officer's identical detailed reasoning had seriously doubted these eleven parties as non-genuine sub-contractors as they turned out to be assessee's former employees without any expertise or background in execution of such infrastructure projects and related activities. And also that their corresponding accounts had undergone immediate cash withdrawals after the assessee had made the impugned payments. All these reasonings stand already reversed in

CIT(A)'s detailed findings [paras 5.13 to 5.27 to be more specific] extracted hereinabove. The CIT(A) has made it clear that neither of these reasonings could withstand the test of judicial scrutiny in first appellate proceedings as the Assessing Officer has failed to pin-point any specific material to this effect. We wish to observe here at the cost of repetition that once the departmental survey action even could not find anything specific against the assessee or his sub-contracts despite having the benefit of sec.292C of the Act, we find no illegality in the CIT(A)'s findings rejecting the Assessing Officer's reasoning in his identical assessments. We thus are of the view that the Assessing Officer had indeed erred in law and on facts in treating the assessee's impugned sub-contractual payments as non-genuine in the given facts and circumstances. Faced with the situation, we find no reason in the Revenue's arguments supporting the assessment findings in entirety. These Revenue's four appeals ITA.Nos.913, 912, 911& 910/PUN./2022 raising the instant sole issue stand rejected therefore.

10. Next comes the assessee's limited grievance that the CIT(A) has erred in law and on facts in directing the Assessing Officer to adopt overall G.P. @ 14% as per his detailed discussion in para 5.36 of the lower appellate discussion. He has admittedly benchmarked the assessee's four infra-projects

i.e., Aundh Rawet Road PCMC Sec-V, IV; Bokhel Site PCMC and Indira Gandhi ROB to Nehrunagar's profit margins @ 11.17%, 12.87%, 11.13% and 12.80%; respectively with its Akurdi site PCN TDA contract with G.P. margin @ 18.34%, thereby adding Rs.40,64,093/-, Rs.6,70,871/-, Rs.4,77,209/- and Rs.3,30,823/-, respectively, totaling to the amount in dispute of Rs.55,42,995/- in issue. We find no merit in the impugned additions. We wish to observe here that not only this tribunal has already assessed the assessee @ 8% in the very line of business in preceding assessment years [para 5.30 in the CIT(A)'s order] but also none of the authorities below could find any error in the books of account leading to rejection of these four projects' book results. These CIT(A)'s findings are mutually contradictory rather wherein he accepts assessee's all substantive arguments on the one hand and enhance its profit margins only in four projects in issue on the other. And that Assessing Officer without any specific evidence to this effect. Faced with this situation, we adopt judicial consistency and direct the learned Assessing Officer to assess the assessee's G.P. @ 8% or that already declared, whichever is higher, as per law in consequential computation. Ordered accordingly. These assessee's seven appeals ITA.Nos.877, 878, 879, 880, 881, 882 & 883 /PUN./2022 are partly allowed therefore.

11. No other ground or argument has been pressed before us.

12. To sum-up, these assessee's 07 appeals ITA.Nos.877, 878, 879, 880, 881, 882 & 883 /PUN./2022 are partly allowed and Revenue's 04 cross-appeals ITA.Nos.913, 912, 911 & 910/PUN./2022 are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 29.05.2023.

Sd/-  
[DR. DIPAK P. RIPOTE]  
ACCOUNTANT MEMBER

Sd/-  
[SATBEER SINGH GODARA]  
JUDICIAL MEMBER

Pune, Dated 29<sup>th</sup> May, 2023

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	The Ld. CIT(A)-12, Pune.
4.	The Pr. CIT (Central), Pune.
5.	D.R. ITAT, Pune "B" Bench, Pune
6.	Guard File.

//By Order//

Assistant Registrar, ITAT, Pune Benches,  
Pune.