

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER
ITA No. 9761/Del/2019, A.Y. 2010-11

M/s. Standard Tele Towers Pvt. Ltd. , C-37, Ground Floor, East of Kailash, New Delhi PAN : AAJCS9262N	Vs.	DCIT, Circle 24(2), New Delhi
Appellant		Respondent

Appellant by	Dr. Rakesh Gupta, Adv. Shri Somil Agarwal, Adv. & Sh. Deepesh Garg, Adv.
Respondent by	Ms. Kajal Singh, Sr. DR

Date of hearing:	20.06.2023
Date of Pronouncement:	19.07.2023

ORDER

Per Anubhav Sharma, JM :

The appeal has been preferred by the Assessee against the order dated 11.11.2019 of CIT(A)-8, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 10304/17-18 arising out of an appeal before it against the order dated 28.12.2017 passed u/s 147/143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the DCIT, Circle-24(2), New Delhi (hereinafter referred as the Ld. AO).

2. **Facts of the Case;** Assessee company had filed return declaring loss of Rs. 10,45,903/- and the case was selected for scrutiny and order u/s 143(3) was

passed at an income of Rs. 99,03,381/-. Addition of Rs. 1,09,49,284/- was deleted by Ld. CIT(A) by order dated 10.05.2013 in appeal no. 23/13-14. Subsequently, an information was received by Ld. AO from the office of DDIT (Inv.), Unit – V(2), New Delhi giving details and findings of search and seizure action carried out on K-World group on 05.04.2012.

2.1 As per the information, the assessee company had awarded contracts during the F.Y. 2009-10 for leveling of agricultural land amounting to Rs. 5.81 crores to M/s. Dingle Buildcon Pvt. Ltd., one of the group concerns of K-World group which were further sub contracted by it to M/s. Seven Heaven Infrabuild Pvt. Ltd., M/s. Rachaita Buildcon Pvt. Ltd. , M/s. Ellora Buildcon Pvt. Ltd. and M/s. Anubhav Buildmart Pvt. Ltd. As per the information all these companies were controlled and managed by Sh. Anil Agarwal who was the entry operator who in his statement admitted that he is an entry operator and the companies being run by him. He also admitted that these companies are used for providing accommodation entries to his clients without any actual work being performed by these companies.

2.2 On the basis of material available on record, Ld. AO after recording reasons about escapement of income issued notice u/s 148 to the assessee to the assessee on 30.03.2017. Assessee filed objections against initiation of proceedings u/s 147/148 which were disposed off by order dated 6.11.2017. Ld. AO examined the P & L account of the assessee as on 31.03.2010 with regard to an amount of Rs. 27.55 crores incurred under the head job work charges (civil and others). On the basis of replies to the queries raised, the ld. AO issued show cause notice to the assessee that why the sum of Rs. 5.81 Cr. spent on job work for leveling of agricultural land for which the assessee company entered into an agreement with M/s. Dingle Buildcon Pvt. Ltd. and which was subsequently sub contracted to the alleged bogus entity controlled by Shri Anil Agarwal should not be disallowed and added to total income of assessee company. The

assessee company claimed that it has no connection with the four sub contractors and assessee has not made any payment to these four sub contractors and that no expenditure is claimed on account of any payment to these four persons. It was also submitted that amount of Rs. 5,81,02,040/- against three bills of Dingle Buildcon Pvt. Ltd. has not been claimed as an expenditure. Since it is part of work in progress as evident from schedule 6 to balance sheet. Opportunity was also sought to cross examine Dingle Buildcon Pvt. Ltd.'s Director Sh. Anil Agarwal.

2.3 Ld. AO observed that assessee has not furnished details of job work done during the year under consideration, therefore notices were issued to the four companies u/s 133(6) of the Act which were received back un-served. Thereafter, Ld. AO relying statements of Sh. Anil Agarwal, Director of M/s. Dingle Buildcon Pvt. Ltd. Sh. J.L.Kesarwani, Director of M/s. Dingle Buildcon Pvt. Ltd. and Sh. Pankaj Jain, G.M. of K-World concluded that the identity and genuineness of the transaction was not established and that assessee had failed to discharge its burden. Ld. AO observed that assessee had failed to produce Directors of the 4 companies to whom payment of Rs. 5.81 crores for leveling of agricultural land was claimed. Thus, the addition of Rs. 58102040/- was made Ld.

3. Ld. CIT(A) had sustained the reasons to believe as stood recorded by Ld. AO. Further, on the basis of statements recorded u/s 132(4) of the Act he sustained the reasoning of the Ld. AO. Para 5 and 5.1 of his order, which are material are reproduced as below :-

“5. Ground numbers 5 and 6 relates to disallowance of Rs. 5.81 crore out of job work expenses. The main contention of the appellant before me was that the amount of Rs. 5.81 crore was not claimed as expenditure in Profit and Loss Account. While going through the audited Profit and Loss Account it has been observed

that Rs. 27,55,47,550/- has been debited to Profit and Loss Account under the head 'Job Work Charges (Civil & Other)' which includes Rs. 5.81 crore. This is really astonishing to note that when expenditure is debited to Profit and Loss Account, how it can be said that the same has not been charged to the Profit and Loss Account. Anything which is debited to Profit and Loss account is a charge to revenue even if the same has been shown as "work in progress".

5.1 Nothing has been submitted by the Appellant during the appellate proceedings to substantiate his claim for Rs. 5.81 crore under the head of 'Job work' charges. During the course of assessment proceedings assessee was required to produce directors of the company to whom payment was made, however the assessee failed to produce the directors of the company before AO. Even before me no details regarding expenses incurred on account of 'Job work' viz. copy of agreement executed with M/s. Dingle Buildcon Private Ltd, Khasra number and location of land where job work was done has been furnished before me. The appellant has not even submitted the area of land on which job work executed, nature of work, rate, how the amount of Rs. 5.81 crore has been arrived at, date when work was commenced, date on which the same was completed, details about material received at site, details of labour engaged at site by the Job worker, bill raised by the Job worker etc.”

4. The assessee is in appeal raising following grounds;

“1. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in holding that action u/s 147/148 has been legally taken.

2. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in holding that initiation of re assessment proceedings was fair and legal.

3. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in dismissing the ground of appeal of the assessee that action u/s 147/148 was legally incorrect in as much as there was no mention of any failure on the part of the assessee to disclose fully and truly all

material facts necessary for assessment. Hence 147 action is illegal and without any jurisdiction.

4. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in holding that addition of Rs. 5.81 cr. made by the AO was correct and justified.

5. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in rejecting the ground of the assessee that in reality there was no debit of expense of Rs. 5.81 cr since the same has been declared in the closing stock.

6. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in dismissing the appeal of the assessee.

7. On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in holding that the expenses have been claimed by the assessee in the profit and loss account without considering and discussing the closing stock which includes the amount debited to the profit and loss account.

5. Heard and perused the record.

6. **Arguments of Appellant.**

Ground No. 1, 2 & 3; These grounds relate to erroneous assumption of jurisdiction while re-opening. Ld. Counsel submitted that the issue of reopening was already examined in the original assessment made u/s 143(3) where Ld. AO made addition of Rs. 1,09,49,284/- which was deleted by the Ld. CIT(A) vide order dated 10.05.2013. Revenue went in appeal to Hon'ble Tribunal which too dismissed the departmental appeal. Referring to **PB 66-68** the assessment order dated 28.03.2013 he submitted that one addition was made on the ground that assessee has not recognized the income in respect of receipt of Rs. 7,90,81,632/- with M/s Indu Project Limited. He referred to **PB 69-73** which is the copy of appeal order from Ld. CIT(A) dated 10.05.2013 in which submission was made

that for this work contract, expenses were also incurred which were shown in Work In Progress and neither expense nor revenue was recognised and such Work In Progress was carried as opening stock in next year and profit in relation to M/s Indu Project Limited was accounted for in AY 2011-12. This appeal was allowed. At **PB 74-78** is the order of Hon'ble Tribunal in departmental appeal in which Hon'ble Tribunal on the same submissions dismissed the appeal of the revenue. He thus submitted that in view of the above facts, action of reopening is bad on the following counts:

i. *The impugned matter was the subject matter of appeal and thus as per 3rd proviso to section 147 such matter could not be taken into for the purpose of the reopening as held in the case of **Metro Auto Corporation vs. ITO & Ors., (2006) 286 ITR 618 (Bom)**.*

ii. *There was no income which was chargeable to tax in the instant case as the above orders would show that the expenses were part of closing Work In Progress and in this year there was no income resulting.*

iii. *It has been mentioned in the 'reason' recorded (**PB 29-31**) that Mr. J L Kesarwani, director of the M/s Dingle Buildcon Pvt. Ltd. and Sh. Pankaj Jain, G.M. (marketing & administration) of K-World group has admitted that the above expenditure in respect of such work was bogus and that contract received M/s Tele Tower was also bogus. **Page 13-15** of the assessment order reproduces the statement of Mr. J L Kesarwani wherein there is no such admission as alleged.*

(iv) *There was no tangible fresh material with Ld. AO having live nexus to the belief that income chargeable to tax has escaped assessment. All that was available was some information from Ld.*

*DDIT(Inv.), Unit V(2), New Delhi wherein allegation has been made that 4 entities namely, M/s Seven Heaven Infrabuild, M/s Rachaita Buildcon Pvt. Ltd., M/s Ellora Buildtech Pvt. Ltd. and M/s Anubhav Buildmart Pvt. Ltd. allegedly controlled by one, Sh. Anil Aggarwal are allegedly in the business of providing accommodation entries and the contract awarded by M/s Dingle Buildcon to these companies are bogus. However, this in itself is no material which could lead to belief that income chargeable to tax has escaped assessment in the hands of the assessee. It is pertinent to mention the said Sh. Anil Aggarwal and the companies allegedly controlled by him are stranger to assessee as assessee has neither entered into any transaction with any of entities mentioned by Ld. AO nor with said Sh. Anil Aggarwal. Moreover, there is no evidence brought on record to show that the work has been subcontracted by M/s Dingle Buildcon Pvt. Ltd. to the companies of Sh. Anil Aggarwal. Even if it has been so, then also, assessee cannot be held liable for the actions of a third person. Thus, it is humbly submitted that there was no material whatsoever with Ld. AO based upon which reasons to believe could be formed and the said reopening is merely on the basis of borrowed belief which is bad in law. He referred to **PB 29-31** which is the copy of reasons recorded. **PB 34-39** is the copy of assessee's reply dated 30.10.2017 filed before Ld. AO on the above lines. **PB 48-49** is the copy of assessee's reply dated 21.12.2017 filed before Ld. AO submitting that assessee has no connection or relation whatsoever with the said subcontractors, no payment has been made to them and no expenditure has been claimed in respect of the said subcontractors.*

(v) *The case of assessee was originally assessed u/s 143(3) (**PB***

67-69) and the reassessment is initiated vide notice u/s 148 dated 30.03.2017 (PB 28) and therefore, in the present case, limitation period for reopening was 4 year from the end of the relevant assessment year as per the 1st proviso to section 147 unless there is failure on part of assessee to disclose all material fact fully & truly. However, in the present case there is no failure on part of assessee to disclose all material fact fully & truly and further even in the reasons recorded (PB 29- 31) no specific allegation has been to this effect. Thus, in absence of a specific allegation the impugned reopening and re-assessment order so passed is barred by limitation and deserves to be quashed on this ground alone. He also referred to PB 48-49 is the copy of assessee's reply dated 21.12.2017 filed before Ld. AO submitting that there was no failure on part of assessee to disclose all material facts and further submitting that there is no specific allegation made in the reasons recorded as to what material facts has not been disclosed by assessee fully & truly and PB 51-63 is the copy of written submissions filed before Ld. CIT(A) submitting that reasons do not provide as to what are the facts which have not been disclosed by assessee.

6.1 Further reliance was placed on the following judicial decisions for the proposition that such reasons based on incorrect fact cannot lead to valid reason and to the belief that income has escaped assessment:

- Dr. Ajit Gupta vs. ACIT, (2016) 383 ITR 361 (Del).
- Shipra Srivastava & Anr vs. ACIT, (2009) 319 ITR 221 (Del).
- Mumtaz Haji Mohmad Memon vs. ITO, (2018) 408 ITR 268, (Guj).
- Vijay Harishchandra Patel vs. ITO, (2018) 400 ITR 167(Guj).
- Reckitt Benckiser Healthcare India Ltd. vs. ACIT, (2014) 360 ITR 427(Guj).
- Balkrishna Hiralal Wani vs. ITO (2010) 321 ITR 519 (Bom).
- Prashant Joshi vs. ITO, (2010) 324 ITR 154 (Bom).

6.2 Furthermore, reliance is also placed on the following judicial decisions

wherein it has been held that there has to be material on the basis of which live nexus with the belief of escapement of the income should be formed and in absence of such material reasons are bad in law:

- ITO & Ors. vs. Lakhmani Mewal Das, (1976) 103 ITR 0437 (SC).
- S.Narayanappa & Ors. vs. CIT, (1967) 63 ITR 0219 (SC).
- Calcutta Discount CO. Ltd. vs. ITO & ANR. (1961) 41 ITR 0191 (SC).
- Ganga Saran & Sons Pvt. Ltd. vs. ITO (1971) 82 ITR 29 (Cal).
- Y. Rajan vs. ITO (1970) 77 ITR 839 (AP).
- Muni Lai Ram Dayal Vs. ITO (1970) 76 ITR 151 (Orissa).

6.3 Further reliance is placed on the following judicial decisions wherein it has been held that in absence of specific allegation in the reason record, the reopening and re-assessment order so passed is bad in law :

- *Sabh Infrastructure Ltd. vs. ACIT, (2017) 398 ITR 0198 (Del.)*
- *Austin Engineering Co. Ltd. vs. JOT, (2009) 312 ITR 0070, (Gujarat).*
- *Gujarat State Co-Operative Agri & Rural Development Bank Ltd. vs. DOT, (2011) 337 ITR 0447, HC Gujarat.*
- *Sesa Goa Ltd. Vs. JCIT & Ors., (2007) 294 ITR 0101, HC Bombay.*
- *B.J. Services Company Middle East Ltd. & Ors. vs. DDIT (International Taxation), (2011) 339 ITR 169, HC Uttarakhand.*
- *CIT vs. ITW India Limited, (2015) 377 ITR 0195, P&H HC.*
- *CIT vs. Suren International Pvt Ltd., (2013) 357 ITR 0024 (Del.)*
- *Bombay Stock Exchange Ltd. vs. DDIT(Exemption) & Ors., (2014) 361 ITR 0160 (Bom.)*
- *Nirmal Bank Securities Pvt. Ltd. Mumbai vs. ACIT, Writ Petition No. 671 of 2022 (Bom.)*

7. Ground No. 4-7: These grounds relate to the merits of addition of Rs. 5,81,00,000/- made by Ld. AO u/s 37(1) by alleging that the works contract given by assessee to one, M/s Dingle Buildcon is bogus and merely an accommodation entry. Further, a consequential addition of 17,43,000/- (3% of Rs. 5,81,00,000/-) u/s 69C on account of alleged commission expense on the said alleged accommodation entry. The action of Ld. AO is alleged to be bad in law and on facts for the following reasons:

1. *That the said expenses are-genuine business expenses as is*

evident from the fact these expense have been accepted in the original assessment proceedings u/s 143(3) and thus, no disallowance can be made u/s 37(1). **PB 67-69** is the copy of assessment order passed u/s 143(3) for the impugned year wherein the said expenses has been duly accepted as is evident from the fact that no disallowance has been made qua this issue.

2. That the said expenses of Rs.5,81,02,040/- has been shown by assessee in its closing stock as work in process. Therefore, firstly it has been debited in the Profit and loss account under the head 'Job Work Charges' as an expense, thereafter, as a result of it being a part of closing stock, a credit of same amount has been given in the profit and loss account. Therefore, there was no impact on profit and in turn there was no impact on tax liability. The above facts are made evident from the following evidences:

PB 4-27 is the copy of audited financial statement of Assessee Company wherein **PB 20** r.w **PB 16** is the schedule of 'Manufacturing/Direct Expenses' (Schedule 12 of P/L account) wherein the said amount has been claimed as expense under the sub head 'Job work Charges (Civil & Other)' which is evident from the ledger account of 'Job work Charges (Civil & Other)' which is acknowledged by Ld. CIT(A) at **in para 5 at page 7** of the appellate order.

PB 19 is the schedule of current asset (schedule 6 of the Financial Statements) wherein under the sub-head 'Stock' this expenses has been included in the item 'Work in Process' showing closing balance of Rs. 24,92,63,912/-.

PB 64 is the copy of ledger account of 'Work in Process' named Job Work (Land) which would show that the said amount of Rs. 5,81,02,040/- (Rs.

2,98,65,785/- + Rs. 1,48,79,645/- + Rs. 1,33,56,610/-) has been duly included in the said closing balance of Rs. 24,92,63,912/-.

PB 16 r.w. **PB 21** is the copy of P/L account and schedule 14 i.e., Tncrease/(Decrease) in Inventory' which would show that the said closing stock (work in process) amounting to Rs. 24,92,63,912/- has been duly credited to P/L account.

PB 48-49 is the copy of reply dated 21.12.2017 filed by

assessee before Ld. AO submitting that the said amount of Rs. 5,81,02,040/- is included in closing stock. Thus, it was submitted that no disallowance could be made as there is no impact on profit and in turn no impact on tax liability and since made, may please be deleted.

7.1 It is submitted by Ld. Counsel that the impugned disallowance has resulted in double disallowance as the said expenses of Rs. 5,81,02,040/- has been credited to Profit and Loss account twice, once as a part of closing stock and again on account the disallowance made by Ld. AO. Thus, same amount has been added to the income of assessee twice which is bad in law and therefore, the disallowance so made may please be deleted.

7.2 Further reliance is placed on the following judicial decisions for the proposition that no addition/disallowance could be made in respect of an amount already stands credited in Profit and loss account:

- *Addl. CIT vs. Gurshant Rotary Compressor Ltd. 15 DTR 429(Del.'C')(TM)*
- *Eland International (P) Ltd. vs. Dy. CIT 26 DTR 113(Del.'C')*
- *CIT v. Vishal Exports Overseas Limited (Gujarat High Court) Tax Appeal No. 2471 of 2009*

7.3 Without prejudice to the above, Ld. Counsel has submitted that even if, the said disallowance of expenditure of Rs. 5,81,02,040/- is to be made, then consequently the said amount is also required to be reduced from the closing stock for the above mentioned reasons which has not been.

7.4 Ld. Counsel also made a written submission meeting out the adverse observation of Ld. AO and Ld. CIT(A) as follows:

1. *“Ld. AO in para 2 at page 1 of the assessment order has mentioned that Ld. AO received an information from Ld.*

*DDIT(inv.), Unit-V(2), New Delhi about some search and seizure operation on one, K World Group and based upon this information Ld. AO has built his entire case. In reply, it is respectfully submitted that the said information does not relate to assessee and also has not been provided to assessee and therefore cannot be relied upon by Ld. AO in view of the decision of Hon'ble Apex court in the case of **Andaman Timber Industries vs. CCE 62 taxmane.com 3 (SC)** and **Kishinchand Chellaram vs. CIT 125 ITR 713 (SC)** wherein their lordship have held that any information which has not been provided/confronted to assessee cannot be taken into consideration.*

2. *Ld. AO in **para 6 at page 2** of the assessment order Ld. AO again has made reference to the information from investigation wing and further alleges that the contract awarded by assessee to M/s Dingle Buildcon Pvt. Ltd. was further subcontracted by it to 4 entities namely, M/s Seven Heaven Infrabuild, M/s. Rachaita Buildcon Pvt. Ltd., M/s Ellora Buildtech Pvt. Ltd. and M/s Anubhav Buildmart Pvt. Ltd. allegedly controlled by one, Sh. Anil Aggarwal. In reply, it is respectfully submitted that this allegation of Ld. AO is denied as assessee has awarded a genuine works contract to M/s Dingle Buildcon Pvt. Ltd. for which work has been done and agreed payment has been made. In any case, assessee neither has any relation with any of these 4 entities mentioned by Ld. AO nor has any knowledge about their association, if any, with M/s Dingle Buildcon Pvt. Ltd. Moreover, M/s Dingle Buildcon Pvt. Ltd. is a third party and not controlled by the assessee and therefore no blame can be fasten towards the door of assessee for any association of M/s Dingle Buildcon Pvt. Ltd. with any of these entities, if there is any, and the said association can be explained by M/s Dingle Buildcon Pvt. Ltd. alone. In view of the above, it is submitted that nothing adverse can be read against the assessee based on this observation of Ld. AO.*

3. *Ld. AO in **para 8.1 at page 4** of the assessment order has mentioned that assessee failed to verify identity, genuineness and creditworthiness of M/s Anubhav Buildmart Pvt. Ltd., M/s Seven Heaven Infrabuild Pvt. Ltd., M/s Ellora Buildtech Pvt. Ltd. and M/s Rachitra Buildcon Pvt. Ltd. and further 133(6) issued to these companies have received back un-served. Further, Ld. AO reproduced the statemet of Sh. Anil Aggarwal at page 6-12 of the assessment order. Ld. AO has also*

reproduced the financials of these entities at page 28-31 of the assessment order. In reply it is respectfully submitted at the cost of reputation that assessee has not undertaken any transaction whatsoever with any of the above mentioned companies and all these companies are stranger to assessee. Therefore, when no transaction has been undertaken by assessee there is no question of substantiating the identity, genuineness and creditworthiness of these entities by the assessee-company and also assessee cannot be held liable for any notice received un-served. Thus, in view of the above, this observation of Ld. AO deserves to be ignored.

4. *In respect of the statement of Sh. Anil Aggarwal, it is respectfully submitted that Sh. Anil Aggarwal is stranger to assessee and his statement does not even pertain to assessee or to the case of assessee. In any case, no opportunity for cross examination has been provided and therefore in view of the decision of **Kishinchand Chellaram vs. CIT 125 ITR 713 (SC)** the said statement cannot be taken into consideration.*

5. *As far as the financials of these companies are concerned, it is submitted that these are not relevant to case of assessee as assessee has not undertaken any transaction with these companies.*

6. ***PB 48-49** is the copy of reply dated 21.12.2017 filed before Ld. AO requesting to provide opportunity to cross examine the said person and further submitting that assessee has no connection or relation whatsoever with all these four entities.*

7. *Ld. AO in para 9(i)-9(ii) at page 4 of the assessment order has mentioned that the director of M/s Dingle Buildcon Pvt. Ltd., namely, SH. JL Kesarwani has admitted that the works contract given by assessee is bogus and reproduced the statement of Sh. JL Kesarwani and Sh. Pankaj Jain, GM of assessee company was reproduced at page 13-18 and 19-26 of the assessment order respectively and the same has been repeated by Ld. AO in para (xv) at page 32 of the assessment order. In reply, it is submitted that this observation of Ld. AO is incorrect at the face of it as the plain reading of these statements would show that no such admission has been made either by Sh. JL Kesarwani or by Sh. Pankaj Jain. These statements neither speak of assessee or the work awarded by the assessee and thus, this observation of Ld. AO is incorrect and deserves to be ignored.*

8. *Ld. AO in para (ix) at page 27 and in para (xvii) at page 33 of the assessment order has mentioned that claim of assessee to cross examine the directors of the companies is no correct and it is the responsibility of the assessee to produce such directors. In reply, it is respectfully submitted that this observation is Ld. AO in incorrect for the reason that firstly assessee requested to cross examine Sh. Anil Aggarwal, whose statement has been relied upon by Ld. AO, however no such opportunity has been provided. Furthermore, as already submitted, these companies are stranger to assessee and thus, director of these stranger companies cannot be expected to be produced by assessee-company.*

9. *Ld. AO at page 33- 34 of the assessment order has relied on various judicial pronouncements. In reply, it is respectfully submitted that the fact of these pronouncement are different from the facts of the case of assessee and thus these judicial pronouncements cannot be relied upon”.*

7.5 Coming to addition on account of alleged commission expense of Rs. 17,43,000/, it is submitted that it is consequential addition and since no addition of Rs. 5,81,00,000/- could not be made as submitted above and thus, the said consequential addition also could not be made in any case, Ld. AO has estimated the commission at the rate of 3% which is bad in law as reasonable commission in these type of transaction at best can be taken in between 0.15% to 0.25% for which Ld. Counsel relied :

- *PCIT vs. Alag Securities Ltd., 425 ITR 658, High Court of Bombay.*
- *Gold Star Finr vest (P.) Ltd., vs. ITO, 57 SOT 409, ITAT Mumbai Bench.*

7.6 Ld. DR countered the aforesaid arguments by relying on the order so Ld. Tax authorities below. She submitted that the trail of transaction has been duly examined by the Tax authorities. She also submitted that the statements of witnesses have been duly relied.

8. Now appreciating the matter on record and the submissions, it will be appropriate to take the grounds together as same are based on common facts and

material before the Bench. It comes up that there is no dispute to the fact that during the assessment proceedings u/s 143(3) of the Act, for the relevant A.Y. 2010-11, the Ld. AO had examined the issue of receipt of Rs. 7,90,81,632/- from M/s Indu Project Limited which assessee had claimed was received against the work order dated 11.08.2009, regarding development of SEZ land as mobility advance. This amount given by M/s. Indu Projects Ltd. to the assessee company was considered by Ld. AO as the undisclosed revenue receipt, however, Ld. CIT(A) had sustained the claim of assessee that the amount were shown as advance in the books of account and as for the work contract the assessee had made certain expenses and these were shown as work in progress since the work was not complete. No expense and revenue was recognized on accounts of this advance as per books of accounts. The Tribunal had also sustained the order of Ld. CIT(A) where it was appreciated that assessee declared profit on these advances in assessment year 2011-12.

9. Now here in this case the claim of assessee is that the payments of Rs. 5.81 which were made to M/s. Dingle Buildcon Pvt. Ltd. was part of execution of work order received from M/s Indu Project Ltd. Though there is no material before the Bench to show the trail of accounting or agreements of assessee with M/s Dingle Buildcon or with Ms/ Indu Projects Ltd. but what is relevant is that assessee claims that in the year under consideration no expenditure on account of job charges has been claimed and job charges have been taken is work in progress. As this fact is not disputed by the Revenue, in the present assessment year 2010-11 any disallowance u/s 37(1) of the Act is not justified and so does the reopening of assessment when the additions made for sum received from M/s Indu Project Ltd, has also not been allowed to be added in the year under consideration by the Tribunal, while upholding the deletion of addition made on that account by the Ld. AO.

10. Even otherwise, the material on record suggests that Ld. Tax Authorities have heavily relied the statements of Shri Anil Aggarwal who is an alleged Entry Operator controlling the four tainted entities, Shri Jawahar Lal Kesarwani, Director of M/s. Dingle Buildcon Pvt. Ltd. and Shri Pankaj Jain, G.M. (marketing & administration) of K-World group recorded during search u/s 132 of the Act. The Statements are part of the assessment order itself and Ld. Counsel in the presence of Id. DR was able to canvass that in none of the statements no specific statement is made by these persons qua the assessee which may indicate that they were involved in showing bogus job work towards assessee. At the same time in the statement of Pankaj Jain it comes up that the Dingle Buildcon Pvt. Ltd. was part of K Group of companies which is involved in the business of construction, contract and owning the land at Ghaziabad. This statement indicates that the Dingle Buildcon Pvt. Ltd. was not run and operated by Shri Anil Aggarwal. There was no direct transaction of the assessee with the four tainted companies operated by Shri Anil Aggarwal. It can be appreciated that primarily on the basis of statements alone and no other corroborative evidence the Ld. AO has drawn the inferences without giving assessee an opportunity to cross examine the said persons, in spite of assessee raising specific request and at the same time Ld. AO has drawn adverse inference as mentioned in para (xiv) of para no. 9 of the assessment order, that assessee was asked to produce Directors of the four tainted companies but assessee failed to produce them and examine and thus, assessee failed to discharge its onus.

11. The bench is of considered opinion that on the contrary when assessee was saying that he had no transaction with the four tainted companies but had made payment to M/s Dingle Buildcon Pvt. Ltd. only and in the Para 8.1 of the assessment order Ld. AO mentions notices issued to these four tainted companies were received unserved, then the onus was on the Ld. AO to have

certainly give opportunity to cross examine Shri Anil Aggarwal, who was allegedly operating these tainted companies.

12. The Bench is of considered view that Ld. AO had fallen in error in invoking the jurisdiction u/s 147/148 of the Act and otherwise the addition is not sustainable too in the relevant AY. The grounds are decided in favour of assessee. **The appeal of assessee is allowed.**

Order pronounced in the open court on 19th July, 2023.

Sd/-

(N.K.BILLAIYA)

ACCOUNTANT MEMBER

Date:- 19.07.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(ANUBHAV SHARMA)

JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI