

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITAs - Assessment Years

2554/Del/2022 (2015-16), 2555/Del/2022 (2016-17),
2556/Del/2022 (2017-18), 2557/Del/2022 (2018-19),
2558/Del/2022 (2019-20) & 2559/DEL/2022 (2020-21)

Shiv Shakti Construction A-142, Omaxe NRI City, Pari Chowk NRI City, Pari Chowk Greater Noida, Uttar Pradesh.	v.	ACIT Central Circle-2 Noida
TAN/PAN: AAZFS6406R		
(Appellant)		(Respondent)

I.T.As. - Assessment Years

2836/Del/2022 (2015-16), 2835/Del/2022 (2016-17),
2834/Del/2022 (2017-18), 2837/Del/2022 (2018-19),
2838/Del/2022 (2019-20) & 2839/DEL/2022 (2020-21)

DCIT Central Circle-2 Noida	v.	Shiv Shakti Construction A-142, Omaxe NRI City, Pari Chowk NRI City, Pari Chowk Greater Noida, Uttar Pradesh.
TAN/PAN: AAZFS6406R		
(Appellant)		(Respondent)

Assessee by:	Shri Harish Choudhary CA Shri Mohit Choudhary CA Shri Nitin Kanwar Adv Ms. Neetu Jain CA		
Department by:	Shri H.K. Choudhary, CIT-DR		
Date of hearing:	03	05	2023
Date of pronouncement:	27	07	2023

ORDER**PER PRADIP KUMAR KEDIA, A.M.:**

The captioned appeals filed by the Revenue and the assessee respectively for various assessment years were heard together and are being disposed of by this common order.

2. The details of captioned appeals under consideration are tabulated hereunder:

<i>ITA No.</i>	<i>Appeal by</i>	<i>AY</i>	<i>CIT(A) order date</i>	<i>Assessing Officer order date</i>	<i>Section under which appeal is filed</i>
2836/Del/2022	Revenue	2015-16	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2554/Del/2022	Assessee	2015-16	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2835/Del/2022	Revenue	2016-17	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2555/Del/2022	Assessee	2016-17	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2834/Del/2022	Revenue	2017-18	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2556/Del/2022	Assessee	2017-18	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2837/Del/2022	Revenue	2018-19	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2557/Del/2022	Assessee	2018-19	CIT(A)-4, Kanpur, dated 27.09.2022	30.05.2022	153A r.w. Section 143(3)
2838/Del/2022	Revenue	2019-20	CIT(A)-4, Kanpur,	30.05.2022	153A r.w. Section

			<i>dated</i> 27.09.2022		143(3)
2558/Del/2022	<i>Assessee</i>	2019-20	<i>CIT(A)-4, Kanpur, dated</i> 27.09.2022	30.05.2022	153A <i>r.w.</i> Section 143(3)
2839/Del/2022	<i>Revenue</i>	2020-21	<i>CIT(A)-4, Kanpur, dated</i> 27.09.2022	30.05.2022	153A <i>r.w.</i> Section 143(3)
2559/Del/2022	<i>Assessee</i>	2020-21	<i>CIT(A)-4, Kanpur, dated</i> 27.09.2022	30.05.2022	153A <i>r.w.</i> Section 143(3)

3. To begin with, we shall take up Assessment Year 2015-16 filed by the Revenue and the assessee respectively for adjudication purposes.

ITA No.2554/Del/2022 - Assessee Appeal – A.Y. 2015-16

4. The grounds of appeal raised by the Assessee read as under:

“The following grounds of appeal are independent of, and without prejudice to, one another -

1. The Commissioner of Income-tax (Appeals) – 4, Kanpur (hereinafter referred to as the CIT(A) erred in rejecting the books of account of the appellants.

The appellants contend that on the facts and in the circumstances of the case and in law, the impugned action of the CIT(A) in rejecting the books of accounts of the appellants is made on patently erroneous facts and in law and hence, not tenable and requires to be reversed.

2. The CIT(A) erred in estimating the net profit at 10% of the gross receipts in view of the fact of rejection of books of account.

The appellants contend that on the facts and in the circumstances of the case and in law, the impugned action of the CIT(A) in estimating the net profit at 10% of gross receipts is made on patently erroneous facts and in law and hence, not tenable and requires to be reversed.

The appellants further contend that the CIT(A) ought to have accepted the income as declared by the appellants in their return of income.

Without prejudice, the appellants further, contend that the rate of net profit estimated is on higher side and requires to be reduced.

The CIT(A) erred in treating other income as separate in computing the net profit at 10% of the gross receipts.

The appellants contend that on the facts and in the circumstances of the case and in law, the impugned action of the CIT(A) in treating other income as separate in computing the net profit at 10% is erroneous on facts and in law and hence, not tenable and requires to be reversed.”

ITA No.2836/Del/2022- Revenue Appeal – A.Y. 2015-16

5. The grounds of appeal raised by the Revenue read as under:

“1. The Ld. CIT(A) has erred in law as well as on facts by deleting the addition of Rs.12,08,41,884/-out of total addition of Rs.15,22,47,537/- by completely ignoring the fact that the assessee has been unable to prove the genuineness of purchases and the corresponding sundry creditors. On bare perusal of the balance sheet of the assessee it is clear that the bogus sundry creditors have been generated to create FDRs against it of similar amounts. In the assessment order it was proved beyond doubt that the assessee has furnished fake bills and invoices and the assessee miserably failed to prove the identity and creditworthiness of the sundry/other creditors and genuineness of transactions. Whereas the primary onus was on the assessee to prove the same. The sundry creditors were also held bogus on the basis of statement of accountant of the assessee Sh. Kuldeep Joshi who admitted that the creditors in the books are mere entries, the infirmities found in the bills produced before the AO in the matter of purchases, huge payments outstanding to be made to the huge amount of ‘other Sundry Creditors’. In face of all these issues the assessee completely failed to prove the genuineness of the sundry creditors and the corresponding purchases. Moreover, the Ld. CIT(A) has also acknowledged the stand of the AO that the creditors shown by the assessee are bogus, based on which the books of the assessee have been held unreliable and rejected.

2. The Ld. CIT(A) has erred in law as well as on facts by deleting the addition made on account of section 40A(3). The assessee has withdrawn huge cash and as per its reply the cash has been utilized for making huge cash payments to labour. However based on incriminating seized documents found during the search which have been made part of the assessment order, it was established that there has been violation of provisions of Section 40A(3) of the IT act, 1961, as the cash payments of more than the prescribed limit under section 40A(3) were made as per the incriminating seized documents. Hence, the cash payments have been made in violations of provisions of section 40(3). However, the incriminating seized documents based on which he addition was made

have been completely ignored by the Ld.CIT(A) and GP rate has been applied whereas there is clear violation of section 40A(3) in this case.

3. Also, the Ld.CIT(A) has erred in law as well as on facts by deleting the addition made on account of lumpsum disallowance @10% of the employee expenses being Rs. 1,89,451/- made due to inconsistencies in 24Q return. The deletion is not acceptable as either the employee expenses debited by assessee were not reflected in the 24Q return or no 26AS of employees was found or the name of the assessee was not reflected in the 26AS of the employees. In these circumstances the genuineness of payments was not proved and also the assessee could not prove the genuineness of these payments and hence the disallowance was rightly made.”

6. Briefly stated, the assessee a partnership firm is stated to be engaged in 100% Government contracts only and is a government approved civil contractor. The assessee is engaged in the execution of irrigation development activities including earth work, canal lining works, river and canal protection works and other work of similar nature. The assessee firm is stated to be also involved in various construction activities of diverse nature. The contracts are executed by the assessee on the basis of contracts awarded based on legal bidding / tendering process of the Government Department. All the receipts of the assessee are from Govt. contracts. These projects are stated to be carried out in remote areas which are not easily accessible. The revenue generated is thus 100% on the basis of approved tenders/invoices generated on the basis of work certified and approved by the government engineers and architects for the work awarded. The material used for construction activities involve material like cement, steel, construction equipment, electrical wires etc. which are bought from specified suppliers. However, many petty and general materials are also needed

such as gritt, coarse sand, local sand and other local materials. Such type of material are purchased from local areas and local vendors which are mostly from unorganized sector.

6.1 A search and seizure operation under Section 132 of the Act was conducted on 27.11.2020 in the premises of the assessee firm. During the course of search operation, certain documents/information belonging to the assessee were found and seized which were allegedly of incriminating nature. Consequently, notices under Section 153A of the Act for various assessment years were issued. In pursuance thereof, the assessee *inter alia* filed return of income [ROI] declaring total income at Rs.2,35,63,250/- for Assessment Year 2015-16 in question. While framing the assessment, the Assessing Officer observed that during the search proceedings, it was gathered from the analysis of the audit report of the assessee firm from F.Y. 2012-13 to F.Y. 2018-19 that assessee firm has shown unusually large quantum of amount outstanding as 'other sundry creditors'. Consequently, the Assessing Officer initiated inquiries and certain individuals connected to the assessee firm were examined on oath. The statement of the accountant of the firm namely Mr. Kuldeep Joshi was referred wherein it was claimed that the accountant deposed that entries towards 'other sundry creditors' in the books are merely book entries. The statement of the accountant was extracted in the assessment order. Based on the findings of the investigation wing on 'other sundry creditors', inquiries

were conducted by the Assessing Officer to seek specific details in this regard from Assessee. The Assessing Officer observed that a list of the sundry creditors showing, Name, PAN, Aadhar number, Address, Amount of the Financial Year in which the liability was related, was filed by the assessee on such creditors. The Assessing Officer however observed that details provided are not complete and the addresses mentioned in the bills do not match with the address in the list. After analyzing the bills and the respective purchase years etc and after taking into account the outcome of summons issued to some parties under Section 131 of the Act and notices issued under Section 133(6) of the Act issued to some other parties, the Assessing Officer concluded that the corresponding purchases against such creditors are bogus and non genuine to the extent of Rs.8,11,39,611/- being increase in the creditors during the year. Consequently, the Assessing Officer embarked upon disallowance of such bogus purchases of Rs.8,11,39,611/- by invoking Section 37(1) of the Act.

7. The Assessing Officer also observed that large amount of cash payments have been made against expenses incurred in violation of Section 40A(3) of the Act. The Assessing Officer referred to the provision of Section 40A(3) of the Act and observed that large amount of cash withdrawals in different assessment years utilized for this purpose. After perusal of the cash books, the Assessing Officer was of the opinion that the cash book has been window dressed to meet the

requirement of Section 40A(3) of the Act artificially keeping the cash payments below limits prescribed of Rs.20,000/-. The Assessing Officer thus determined the violation of Section 40A(3) of the Act and quantified an estimated figure of Rs.7,09,18,475/- on this count. Another estimated disallowance of Rs.7,89,451/- was carried out on account of unverified employee expenses. The income was finally assessed at Rs.17,58,10,789/- against returned income of Rs.2,35,63,250/- for the Assessment Year 2015-16 in question.

8. Aggrieved by the disallowance towards bogus purchases, i.e., estimated increase in sundry creditors; cash expenses incurred in violation of Section 40A(3) of the Act and estimated unverified employee expenses etc, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee filed detailed submissions and factual analysis to assail the action of the Assessing Officer as reproduced in paragraph 6.5 of the first appellate order.

8.1 The assessee broadly pleaded that to appreciate the issue in perspective, it is necessary to understand the nature of business and hurdles associated with it. The materials are supplied by the large vendors as well as local vendors. Mr. Kuldeep Joshi was neither privy to the correct facts nor was competent to offer his comments. The statement given was without knowledge of the affairs and under coercion which was retracted in the course of assessment. Likewise, while the

partner of the firm Mr. Mukesh Kumar was not able to furnish the complete details of 'other sundry creditors during the course of search or investigation proceedings but however, it is also a fact that the assessee did produce the details of creditors, their names addresses, PAN, Adhar, Confirmations, supporting vouchers, details of payments through banking channels in the course of assessment proceedings. The AO also made enquiries by issuing summons under S. 131 or by issue of notice under S. 133(6) with suppliers. The assessee contended that assessment order demonstrates that such parties have actually responded and adduced evidences available with them, meaning thereby that such parties were found to be in existence and have undertaken supplies to the assessee. It was thus contended that large scale rejection of 'other sundry creditors' by the AO on suspicion and surmises disregarding tangible proof of purchases has resulted in perverse conclusion. It was also harped that the assessee being a Govt. contractor was bound to execute the contracts as per specifications to get the release of funds from the Govt.. The assessee could receive payments only when the work is completed as per the parameters and when all norms were met. Hence the approval for release of payments impliedly means that the material has been used and services have been rendered as per the contract specifications. Each and every material received at project site was first verified physically by the Govt. officials and once it was found according to requisite specifications

and approved by them only then the Assessee contractor was authorized to carry out the work. Such verifications were recorded in measurement books which contain quantity of material used by the assessee to perform the contract. These measurement books were produced on sample basis which contained site wise quantity of material used during the year to complete the work. All the documentary records like contract, its specifications, supporting bills for material, quantitative reconciliation of material with bills and measurement books was submitted before AO and no adverse observations were made in this regard. It was contended that only issue red-flagged by the AO was that the expenses are not verifiable with supporting evidence in the opinion of the AO. However, the AO failed to take note of circumstantial peculiarities and hazards while executing the work in remote areas which are not quite accessible and where material are supplied by the unorganized local vendors. The AO disregarded the proof of existence of vendors, consumption of material as per specifications of the Govt. holistically and founded its view to reject the purchases on petty defects such lack of VAT no. in the supply bills, bills carrying same or similar handwritings etc. The payments, where remained outstanding, was shown as sundry creditors and it is common knowledge that the release of funds by the Govt. agencies are, at times, characterized by red-tapism and inordinate delays.

8.2 As regards disallowances under Section 40A(3), the

assessee contended before CIT(A) that cash book was duly furnished. The books were seized also. The large cash withdrawal undertaken cannot be the basis to infer violation of Section 40A(3) and such disallowance can be carried on the basis of specific instances which are conspicuously absent.

8.3 The assessee on the basis of such detailed submissions thus claimed that the assessment order grossly suffers from the vice of perversity and the assessment order is rendered without objective consideration of the facts placed and peculiar circumstances, the assessee is placed in and misapplied the law prevailing in this regard.

9. The CIT(A) found partial merit in the various plea raised and restricted the aggregate disallowance of Rs.15,22,47,537/- on account of bogus purchases, violation of Section 40A(3) of the Act and disallowance out of employees expenses etc. The disallowance was ultimately scaled down from Rs.15,22,47,537/- to Rs.3,14,05,653/-. A relief of Rs.12,08,41,884/- was thus given to the assessee by the CIT(A) for Assessment Year 2015-16 in question. Similar reliefs on such premises were given by the CIT(A) in other assessment years as per captioned appeals. The relevant operative paragraph of the order of the CIT(A) for Assessment Year 2015-16 in this regard is reproduced hereunder:

“6.14 have carefully perused the findings of the AO in the assessment order. There are huge other sundry creditors and the same are outstanding for payments for long time, from the audited balance sheets and its schedules, it can be seen that their proportion is very high. The onus of proving genuineness of purchases is upon the appellant and if the

appellant fails, to prove the genuineness of the same, such purchases cannot be allowed. During the search proceedings, the statement of Sh. Kuldeep Joshi, accountant of the firm has been recorded and he has also stated that the other sundry creditors are just book entries. Sh. Mukesh Kumar the main partner of the firm was also not able to furnish all the evidences and give the complete details of such sundry creditors. But there is also force in the submission of the AR that the appellant is a govt. contractor and all the works have been completed, hence the use of material as well as services of the laborers cannot be denied. Further in the matter of hand written bills in which various discrepancies have been found, the observation of the AO cannot be ignored that the same does not appear to be reliable bills specially when the appellant could not furnish all the requisite details as called for by the AO and the appellant failed to prove genuineness of all purchases and when summons and notices could not be properly responded. Further it has been found that in the search proceedings ample amount of evidences have been gathered and produced in the body of assessment order which clearly indicates that provisions of section 40A(3) of IT Act have been violated. But at the same time it cannot be ignored that the nature of the business of the appellant is such that the appellant has to perform work in the remote areas, where there are no facilities of banks, ATMs and the site in-charges have to keep cash ready for payment to the laborers as well as suppliers of sand, gritt, bricks and all related material which is supplied and provided by local unregistered and petty suppliers. In the light of the peculiar circumstances of the case, the AR was asked to explain as to why books of accounts should not be rejected and the NP should be estimated in the light of provisions of section 145(3) of IT Act. The AR relied on the written submission furnished before the AO as well as in the appellate proceeding and submitted that books of accounts have been audited and the same should not be rejected. But the submission of the AR has not been found correct, the AO has brought on record sufficient material which leads to the conclusion that books of accounts cannot be relied.

6.15 In the assessment orders of AY 2014-15 to AY 2020-21, the AO has made disallowances on account of Bogus purchases, for violating provisions of u/s 40A(3) of IT Act and due to unverifiable labour expenses, but the same result into very high NP which is not possible in the nature of such business, in which the appellant works. The NP of the business after disallowances made by the AO in these assessment orders is computed as under:

AY	Total sundry creditors	Other Sundry Creditors (Rs.)	Incremental increase (as per assessment order) (Rs.)	Turn-over/gross contract receipts	Sundry Creditors/gross contract receipts in %	Net Profit as shown by appellant	Disallowances made by Assessing Officer	NP and NP Percentage of turn-over after disallowances
2014-15	10,02,14,793							
2015-16	19,33,91,731	18,13,54,404	8,11,39,611	34,48,88,689	56.07%	1,55,25,932	8,11,39,611 + 7,09,18,475 + 1,89,451	16,77,73,469 (48.65%)

201 6-17	33,01,01,6 06	44,00,30,6 22	25,86,76,2 18	98,50,42,7 72	33.50%	4,34,42,0 60	25,86,76,21 8 +12,78,67,9 75 + 3,26,169 +8,52,408	43,11,61,8 30 (43.77%)
201 7-18	68,07,47,4 26	67,31,21,4 20	23,30,90,7 98	65,30,19,3 46	104.24%	3,59,03,4 53	23,30,90,79 8 + 8,03,46,431 +2,82,783 + 8,54,313	35,04,77,7 78 (53.67%)
201 8-19	66,98,81,5 32	66,05,24,8 50		33,39,63,0 19	200.59%	2,07,76,3 88	15,31,71,23 7 +5,07,100	17,44,54,7 25 (52.54%)
201 9-20	92,70,58,8 74	91,93,14,7 43	25,87,89,8 93	60,38,38,1 98	153.53%	2,81,95,5 08	25,87,89,89 3 + 5,14,53,169 +1,48,002	33,85,87,5 72 (56.07%)
202 0-21	98,39,24,3 25	97,05,64,7 43	5,12,50,00 0	69,76,06,2 68	141.04%	4,21,53,6 18	5,12,50,000 + 9,15,19,864 + 3,85,454 + 1.47,75,588	20,00,84,5 24 (28.68%)

From the above table it can be seen that in a case of the appellant if the disallowances are made on account of alleged Bogus expenses and expenses incurred in cash above prescribed limit as per provisions of section 40A(3) of IT Act and unverified employee expenses, the NP becomes very high. Therefore looking to the facts and circumstances of the case, though the decision of the AO of making disallowance on account of expenses is sustained but its quantum is restricted. In this regard it would not be out of place to mention that in AY 2015-16 the AO has considered incremental increase in 'other sundry creditors' as Rs. 8,11,39,611/- by considering 'other sundry creditors' as Rs. 18,13,54,404/- in AY 2015-16 and Rs.10,14,02,793/- in AY 2014-15, though the fact is that in AY 2014-15, this amount is for 'all sundry creditors' as is clear from the para-4 of assessment order itself. The Assessing Officer could not do the proper analysis of exact purchases made from such 'other sundry creditors', which are actually Bogus and a general estimate is done which is very high Further the summons and notices are issued selectively, however the number of such other sundry creditors' is around 841. Further the statement of an accountant i.e. Sh. Kuldeep Joshi has been applied sweepingly on all other sundry creditors, though the appellant has questioned his competency and domain since he is simply maintaining accounts and is not aware of the real nature of suppliers. In the matter of disallowances made u/s. 40A(3) of IT Act, there is force in the submission of the AR that the payments made to a single party in a single day above Rs. 20,000/- for AY 2015-16 to 2017-18 and above Rs. 10,000/- for AY 2018-19 to 2020-21 have not been singled out and cash withdrawal amount from the bank as reduced by payments made to labors and 10% estimate for other expenses incurred in cash, has been estimated and balance amount has been disallowed. While making such estimates, the AO needs to be reasonable and make the disallowance which may result into right taxable income. Therefore the decision of disallowance of the AO is upheld but quantum of disallowance is restricted.

6.16 In the light of findings of the search which lead to clear evidence that the provisions of section 40A(3) of IT Act have been violated, huge cash payments have been made for labor payments as well as purchases, the appellant has failed to discharge the onus to prove the purchases from other sundry creditors, statements recorded on oath from the accountant as well as main partner of the firm, the infirmities found in the bills produced before the AO in the matter of purchases, payments outstanding to be made to the huge amount of 'other Sundry Creditors' and number of evidences of huge cash payments made to various persons, relating to which seized material has been produced in the body of assessment order, I hereby hold that books of accounts of appellant are not reliable. Therefore provisions of section 145(3) of IT Act are hereby invoked since the undersigned is not satisfied about the correctness of the accounts of the assessee. In the light of this decision, the disallowance made by AO on various heads is restricted in such a way that NP of contractor-ship business should be @ 10% of gross receipts of contractor-ship business.

6.17 Based on the above observations, the following table is made for restricting disallowance by considering NP @10% of turn-over. In this regard it has been found that the appellant has earned huge other income ie interest income on FDR, is just on IT refunds, NSC Interest, share of profit from JV and other such receipts, which are not related to contractor-ship business and hence the same are kept separate while computing the NP of the contractor-ship business as under:

AY	Turnover/ gross contract receipts (a)	Net Profit as shown by appella nt (b)	Other income (interest from FDR, interest on IT refund, NSC Interest , other income, share of profit from JV) shown in P&L account ©	Net Profit attribut able to contract or-ship busines s (d= b- c)	Disallowances made by Assessing Officer (e)	Total NP @ 10% of turnove r (=10% of a)	Net Disalloa nce (NP @10% of turnove r NP as already shown (g =f-d)	Relief allowed to the appellan t (h=a-g)
201 4- 15								
201 5- 16	34,48,88, 689	1,55,25, 932	1,24,42, 716	30,83,2 16	8,11,39,611 + 7,09,18,475 + 1,89,451 =15,22,47,537	3,44,88 ,869	3,14,05 ,653	12,08,41 ,864
201 5- 16	98,50,42, 772	4,34,42, 060	2,48,61, 156	1,85,80, 904	25,86,76,218+12,78,64,975+3,26,16 9+8,52,408 =38,77,19,770	9,85,04 ,277	7,99,23 ,373	30,77,96 ,397
201 6- 17	65,30,19, 346	3,59,03, 453	4,82,43, 929	- 1,23,40, 476	23,30,90,798=80346431+282783+8 54316=314574325	653019 35	776424 11	236931 914
201 8-	33396301 9	207763 88	461734 80	- 253970	15317123+507100=153678337	333963 02	587933 94	948849 43

19				92				
2019-20	603838198	28196508	55926950	-27730442	258789893+51453169+148002=310391064	60383820	88114262	222276802
2020-21	697606268	42153618	53596996	-11443378	51250000+91519864+385454+14775588=157930906	69760627	81204005	76726901

While restricting disallowance made by the AO, it was necessary to have a cap on the NP of the business and the same has been considered @10% of turn-over/receipts from govt. contracts, however it has been found that the appellant has included other receipts i.e. interest on FDR, Interest on NSC, Interest on IT refund and share of profit from JV, but the same has been excluded in the NP working. It can also be seen that the appellant has also shown her loss in its core business and the positive NP was appearing in the profit and loss account only because of such other receipts which are not arrived from the contractor-ship business. Therefore looking to the findings of the search proceedings and various evidences produced in the assessment order, the decision of the AO is upheld to make disallowance of purchases made from various other sundry creditors, disallowances for violation of provisions of section 40A(3) of IT Act and other discrepancies found in the claim of expenses but at the same time since the estimation of such disallowances was leading to very high and absurd NP, the same is restricted to 10% of total turn-over of contractor-ship business of the appellant. In this regard the AR has drawn attention to the provisions of section 44AD of IT Act in which presumptive NP is taken @8% as also reliance is placed on the decisions of higher judicial authorities, in which NP rate has been taken @8%, but in this particular case the AO has not only questioned Other Sundry Creditors' ie. the suppliers which are Bogus, violations of provisions of section 40(3) have been found in a very big scale, Further the volume of business is very high than the limit prescribed for presumptive tax rate of 8% in section 44AD of IT Act, therefore while restricting disallowances made by the AO the NP cap is taken @10% of gross receipts.

6.18 In the light of above observations total disallowances of Rs. 15,22,47,537/- made by the AO in this AY 2015-16 is restricted to Rs. 3,14,05,653/- and relief of Rs.12,08,41,884/- is allowed to the appellant.”

10. Aggrieved by the partial relief given by the CIT(A), both the Revenue as well as the assessee are in Cross Appeals before the Tribunal for respective assessment years. While the Revenue is aggrieved by the scaling down and reduction of the disallowances as per estimates, the assessee is aggrieved by

the retention of a part of the disallowances.

11. When the matter was called for hearing, the ld. CIT-DR for the Revenue broadly reiterated the observations made by the Assessing Officer and submitted that the CIT(A) was not justified in granting partial relief against the disallowances so carried out. It was submitted that Assessing Officer has painstakingly pointed out the defects in the books and papers seized and rightly carried the disallowance in the absence of proper corroboration.

12. Per contra, the ld. counsel for the assessee supported the partial relief granted by the CIT(A) but however assailed his action for denying complete relief as claimed before him. It was alleged that CIT(A) failed to appreciate business spectrum, factual matrix and attendant circumstances in its natural perspective.

13. We have carefully considered the rival submissions and perused the respective assessment orders, respective CIT(A) orders as well as the material placed on record. The controversy involves correctness of estimated disallowances made by the Assessing Officer towards alleged bogus purchases, violation of Section 40A(3) and verified employee expense. The connected issue arises on the correctness of action of CIT(A) towards estimation of taxable income and manner and extent of estimations. The whole gamut of issue is essentially factual in nature.

13.1 On perusal of the order of the CIT(A), it is noticed that CIT(A) observed that the assessee has failed to properly discharge the onus with respect to purchases from 'other sundry creditors'. In the absence of proper corroboration, the books of account of the assessee were rejected and the provision of Section 145(3) was invoked. Having rejected the books of account, the CIT(A) estimated the likely profits derived by the assessee from contract business disregarding the expenses claimed by the assessee. The net profit of the contract business was holistically estimated at 10% of the turnover/receipts from the government contracts. While doing so, however, interest on FDR, interest on NSC, interest on income tax refund and share of profit from joint venture etc. were excluded for the purposes of estimations holding such income to be unconnected to contract business *per se*. As a result of such exercise, the net profit were estimated at 10% of the turnover/receipts and the total estimated disallowance of Rs.15,22,47,537/- made by the Assessing Officer for Assessment Year 2015-16 was brought down to Rs.3,14,05,653/- and a relief of Rs.12,08,41,884/- was provided to the assessee in the process.

13.2 The assessee challenged the rejection of books of account as well as estimations of profits at higher percentage of 10% of contract receipts on the ground such estimations are quite excessive when compared with the actual book results of the preceding several assessment years and also incongruent to the statutory estimations recognized and

prescribed by the Income Tax Act under presumptive taxation scheme of Section 44AD of the Act and other similar presumptive tax provisions. The assessee contends that such presumptive income at 8% of receipts is determined based on threadbare study of empirical data collected and collated from various sources by the government and thus provides a sound basis for estimations at 8% of business receipts. The increased turnover in fact, would ordinarily bring down profit ratio rather than enhancement of estimations @10% as perfunctorily done by CIT(A). The assessee also simultaneously challenged the action of the Revenue Authorities for taxing the entire amount of interest generated on fixed deposits on the ground that such fixed deposits have been solely used for the purpose of business and served as collateral for obtaining bank finance. The fixed deposits were stated to be money parked for immediate financing needs and do not represent any idle funds or any kind of surplus. The assessee thus claimed that the principles applied for estimations of profits on contract receipts after rejection of books should apply *mutatis mutandis* to all stream of business income including fixed deposits which are integral and intrinsic part of the business activity of the assessee and directly contributes to the carrying on of business only. As contended, the contract business cannot possibly run without the use of securities and guarantees compelling the assessee to set aside the money by way of FDs. The assessee thus contends that fixed deposits being part of working capital

interest income on such FDs, cannot be divorced from business receipts.

14. Paradoxically, the Revenue has also challenged the rejection of books by CIT(A) and contended that the profit estimations made by the CIT(A) disregards the substantial incriminating documents found in the course of search. The Revenue thus has sought restoration of the assessment order and seeks to challenge the estimation of income by rejection of books of account.

15. While dealing with the issue, it may be pertinent to summarize the key observations emerging from the first appellate order of CIT(A) and submissions of the Assessee:

(i) The assessee is a government approved contractor deriving revenue solely from government contracts. Thus, there is little possibility of any unaccounted receipts in cash *per se*. No incriminating documents were found in the search either to reflect any such cash receipts. Hence, the dispute, if any, can arise only in relation to the expenses/outgo incurred in cash. As observed by the CITA), the firm has purchased material predominantly from regular vendors supplying steel, cement, construction equipments, electric wires etc. However, certain relatively small value items such as gritt, coarse sand, local sand and other similar fringe materials used in the execution of contracts, were ordinarily purchased from small time local vendors since

such kind of irrigation and other construction projects are executed in remote areas where local suppliers supply small quantities of material more conveniently and efficiently. Such fringe suppliers issue local printed bills and are generally not registered under any Sales Tax/VAT/GST Act. The bills are also prepared by some comparatively literate persons locally available in the vicinity of project site resulting at times, in similarity in handwritings. Besides, the assessee-firm being engaged in government contracts, such projects are constantly supervised and monitored by government functionaries and standardized norms are supposed to be adhered to get the release of funds from the government agencies and since the requisite work are to be performed, the purchases and supply of services are clubbed under the head 'other sundry creditors'. The local supply of material and service is quite plausible and cannot be disregarded.

(ii) The reliance placed on the statement of Kuldip Singh before the investigating team to draw adverse inference is not justified. Kuldip Singh is a mere junior accountant/ field boy mainly engaged for bank purposes and other petty work. He is no person of any worthy knowledge to comment on the affairs of the contract work. The statement of such low rung person obtained under duress and influence has no rational probative value for making such whopping estimated disallowance

out of 'other sundry creditors'. Significantly, the assessee also filed retraction statement on oath of Shri Kuldip Joshi wherein he has asserted coercion and duress earlier. The statement of Shri Mukesh Kumar does not cast any aspersions in the state of affairs of the assessee firm either.

(iii) The increase in 'other sundry creditors' was rejected by AO *in toto* without recognizing any expenses incurred whatsoever. The entire expenses incurred and credited have been treated as bogus on flimsy grounds without taking note of ground reality. This act of disallowance towards bogus purchase has the effect of unpalatable and spectacular increase in the net profit ratio. The high pitched disallowance was carried out by the AO based on stray instances of quoting sample bills obtained from local suppliers primarily on the ground that payments have not been made without understanding the constant constraints of cash flow in Govt. contracts.

(iv) The pendency of outstanding amount to the supplier is attributable to prolong delay in corresponding receipts from the government contracts. The poor cash flow has resulted in such outstanding creditors. The payments to the tune of Rs.35.61 were however made to such creditors out of receipts obtained towards government contracts.

(v) The fixed deposits were kept owing to specific needs

of the contract business to serve the purposes of security and meet the immediate contingency. The money lying in fixed deposits served as working capital to meet the business exigencies of Govt. contracts. The outstanding amount towards 'other sundry creditors' are dynamic and keeps changing in proportion to change in Contract Performing Expenses.

(vi) The assessee has purchased material from the vendors on credit for which confirmations were duly provided and therefore it is incorrect to say that onus on the assessee was not discharged at all.

(vii) The adverse inference toward creditworthiness of creditors and their meager income is of no real consequence as a seller needs to check the credibility of the buyer and not vice versa. The assessee as a beneficiary of the supply of material and services is not expected to obtain a dossier on the creditworthiness of a supplier.

(viii) The assessee executed canal construction projects for which gritt, stone, sand etc. are required and such material are supplied by local vendors who pick material from the miners and supplies are made using their mode of transportation. The assessee has maintained records of Aadhar number as an identity proof of the supplier. The supply are obtained credit basis/cash basis from time to time since they are small time suppliers from unorganized sector. The materials are delivered by carts,

tractors, trolleys, etc. and therefore, no LR or GR are issued. The adverse inference drawn on purchases in the absence of transportation proof etc. is thus *dehors* the ground realities.

(ix) With respect to disallowance of expenses carried out for assumed breach of limits under Section 40A(3) of the Act, as stated before CIT(A), the expenses are incurred out of cash withdrawals from banks in the respective assessment year for payment of expenses such as labour, purchase of material and other project related expenses. The books of account showing cash payments towards expenses were seized at the time of search and therefore, there was no scope for any manipulation to comply with provisions of Section 40A(3) of the Act. The breach of S. 40A(3) has not been demonstrated by the AO qua the books seized.

(x) As regards estimated disallowance of 10% of the employees' expenses, the TDS has been deducted whichever applicable.

(xi) The net profit ratio declared in sync with the book results in the past and also quite comparable with other contractors in similar business.

16. In the backdrop of these facts and detailed submissions filed on behalf of the assessee, the CIT(A) also observed that the disallowances made towards alleged bogus creditors and other disallowances under Section 40A(3) and unverified

employee expenses, if given effect in the respective assessment years, the net profit ratio to the turnover would show meteoric rise to staggering percentage of unrealistic nature. For instance, for Assessment Year 2015-16, the net profit ratio would stand at 48.65% as against the profit ratio of 6.59% declared by the assessee. Likewise, net profit ratio of the other assessment years as tabulated at page no.54 of the first appellate order, would rise upto as much as 56.07% of the contract value which is manifestly absurd and unimaginable in such business. The high pitched income assessed thus do not resonate with ground realities.

17. Taking into account many glitches in the explanation of the assessee and in the absence of adequate corroboration of the expenses claimed, the CIT(A) however concluded that the onus of proving genuineness of purchases has not been fully discharged and it is difficult to reconcile and deduce true profits of the assessee-firm from the books maintained. Having regard to the totality of the circumstances, such unrealistic variation in the net profit ratio, difficulty in identifying and analyzing of exact purchases made from such 'other sundry creditors', huge cash expenses incurred towards labour and other payments, etc.,, the non compliance of summons and notices to suppliers in some instances etc., the CIT(A) opined that books of account of the assessee cannot be said to be reliable and without element of doubts. Provision of Section 145(3) of the Act was thus referred to hold that the correctness of accounts of the assessee is not satisfactory. In

the absence of exact identification and quantification of bogus purchases by AO, net profit ratio declared by the assessee qua the net profit ratio determined on the basis of estimated disallowances carried out by the Assessing Officer, the CIT(A) adopted a reasonable approach to sort out the issue and estimated the chargeable income @10% of the contract turnover excluding the interest income on FDR, IT refunds, NSC interest, share of profit from JV and other such receipts which are stated to be not related to contract business. The net taxable profits from contract business was thus estimated at 10% of receipts/ turnover from such contract receipts. Additionally, the interest income from fixed deposits and income by way of discounts were reckoned to separate and distinct stream of income chargeable to tax on gross basis.

18. The assessee, in its appeal, has challenged the action of the CIT(A) on the ground that (i) rejection of books are not justified owing to availability of corroborative evidences in support of book entries towards purchases and other expenses (ii) without prejudice, the estimations made @10% of gross receipts are very high as compared to such similar contract business where the net profit ratio ordinarily ranges between 5-6% only. Besides, the assessee has also challenged non inclusion of interest on fixed deposit and other income derived in the course of business for the purposes of estimations on the ground that fixed deposits are not idle or surplus funds of the assessee but are integrally connected to the business operations of the assessee. Such fixed deposits

are made perforce, to use them for security and guarantee purposes and thus cannot be seen in isolation unlike other types of business where surplus funds are normally kept in such instruments as a matter of course. The assessee contends that large outstanding on account of liabilities itself suggests acute dearth of funds for such investments. The fixed deposits are bound to be kept in such business to utilize for guarantees, securities and other unforeseen emergencies. Furthermore, the assessee also contends that share of profit from the JV are completely exempt under Section 10(2A) and thus has to be excluded for the purposes of determination of taxable income.

19. The assessee before us restated and reiterated the arguments placed before CIT(A) earlier and vociferously contended that having regard to a very high volume of business, the profits generated in such contract business are quite low and the presumptive tax @ 8% as prescribed under Section 44AD of the Act is best guiding estimate under the circumstances which should serve as bench mark without prejudice to the primary argument that rejection of books itself is unjustified in the factual matrix. The assessee thus pressed for reversal of rejection of books and restoration of the profits declared by the assessee or in the alternative, the profit estimate should stand in the region of 6-8% of the turnover/ contract receipts including similar estimations on interest generated from fixed deposits etc. instead of 10% applied by the CIT(A) and that too excluding such interest

income from fixed deposits and discounts availed.

20. The Revenue on the other hand has called upon the tribunal to restore the action of the Assessing Officer in the absence of material particulars made available by the assessee to support the book results. The Revenue contends that onus lay upon the assessee to adduce evidences in support of return and rebut the adverse material found in the course of search and such onus has not been discharged. The AO was thus left with no option in the matter.

21. On appraisal of the facts and evidences placed in totality, we find that the CIT(A) has given a rather objective consideration to the factual matrix and has analyzed the fact situation, usage of the trade and the common practices adopted in the contract business and has approached the issue in a quite reasonable and fair manner. The CIT(A) has given due weight to the nature of business carried out by the assessee. We concur with the findings of the CIT(A) that while the assessee has attempted to correlate and collate the factual matrix to justify the books results, there are visible fill-in gaps which has not been filled, warranting estimates of profits in a fair and nonpartisan manner. Except for making reference to some hand bills remaining unpaid and lack of evidences towards transportation, unsupported statement of low rung employee etc, the AO has also not brought out specific defects in the books despite drastic action of search. The AO has resorted to complete disallowance of increase in 'other sundry creditors' disregarding the nature of expenses, its necessity

and also the peculiarity of business of execution of Govt. contracts. The AO has also disregarded the fact that a part of such creditors may also relate to other assessment years. The AO has assumed that all increase in sundry creditors represents bogus purchase. Such approach is apparently superficial. Likewise, estimated disallowance towards cash expenses are also in the realm of conjectures and surmises without any concrete evidence. The books seized has not been taken into account to gauge the correctness of cash payments in tune with S. 40A(3) of the Act. The Hon'ble Kerala High Court in the case of *CIT (central), Kochi vs. Damac Holdings (P) Ltd. (2018) 89 Taxmann.com 70 (kerala)* observed that in the case seizure of documents in the course of search, the presumption under 132(4A) would be equally available to the assessee as well. The contents of books and documents found in possession and control of searched person thus shall be deemed to be true and the presumption would apply to both sides and such presumption thus, in effect, a double edged sword. The presumption of correctness of entries found in the books at the time of search has not been rebutted by the revenue. While the cash payments toward labour expenses have been accepted by the AO, other expenses have been whimsically estimated and rejected showing uneven and inconsistent approach in the matter of assessment.

22. When seen holistically and in totality, the CIT(A) to our mind, in the balance of things, has rightly rejected the books of account and set aside book results for fair and benign

estimations of profits and to shun absurdity in the income assessed. While, the assessee has provided justifications towards large creditors arising year after year, such justifications are largely circumstantial and abstract. The outstanding creditors of such significant amounts in the context do invoke disquiet. It is indeed difficult to appreciate the correctness of book results in an objective manner. The AO has made wide ranging observations against the assessee. The CIT(A) while examining the issue could not be said to be in the zone of comfort to give objective considerations to the complex factual matrix presented to him. Under the circumstances, in our considered opinion, the estimation of income carried out by the CIT(A) was best course available and cannot be displaced on first principles. We thus see no justifiable reason to interfere with the approach adopted by the CIT(A) in this regard.

23. We now advert to the contention of the Assessee towards excessive estimation of net profit ratio. The assessee has challenged the net profit ratio estimated by the CIT(A) @ 10% instead of 8% adopted under presumptive scheme of taxation provided under Section 44AD of the Act. The Assessee contends that such percentage adopted under statute is after carrying mammoth background exercise and is based on strenuous empirical studies. The larger volume or turnover rather has the effect of bringing down such ratio even further. The decision of the Hon'ble Delhi High Court in the case of *CIT vs. Subodh Gupta, (2015) 54 taxmann.com 343 (Del)* has

been relied upon by the assessee for substitution of the estimation at fair per centage of 8% at best.

24. We however do not see merit in the plea of the assessee for such indulgence. The issue is highly factual and varies from case to case. The income estimated at 8% in the case of *Subodh Gupta (supra)* is based on its own set of facts. The judgment in *Subodh Gupta* cannot be read to mean that net profit ratio of 8% is sacrosanct percentage in all circumstances. The CIT(A), in his wisdom, has estimated profit at 10% after considering host of circumstances such a quality of evidence made available to support 'other sundry creditors', large cash expenses incurred, the net profit ratio declared and net profit ratio determined by the Assessing Officer etc. The law has not invented any straight jacket formula to judge such estimations precisely. Such estimations are in the realm of probabilities. There is nothing conclusive about it. The estimations carried out by the CIT(A) cannot be said to be marred by any kind of perversity. The estimates of profits by the CIT(A) are not fanciful or whimsical but appears to be guided by the principles of objectivity, fairness and considerations of justice and maintains some sort of equilibrium. We thus are not inclined to interfere and re-estimate the estimations made by the CIT(A) in the absence of any palpable overreach on this score.

25. We however find merit in the plea of the assessee towards treatment of interest on fixed deposits as integral part of business activity. It is common knowledge that the

large scale guarantees and securities are required in contract businesses. The factual matrix also underscores the proposition that the fixed deposits have not been placed to enjoy interest income simpliciter out of any surplus money. Circumstantially, large scale outstanding liabilities suggests otherwise. Coupled with this, the assessee has also incurred interest and finance costs. Having regard to the peculiarity of contract business, the claim of the assessee that the interest on FDRs cannot be seen differently from receipt derived directly from contract work carries weight. Having regard to the nature of business, we thus find force in the plea of the assessee that such FDRs are nothing but integral part of working capital of the assessee kept and expanded for commercial reasons. Hence, the interest income deserves to be treated alike with business contract receipts for the purposes of estimations. The interest income cannot be treated differently from contract receipts merely because such income flows from a different source. As already noted, the fixed deposits are a necessity to provide security and meet the contingency of such peculiar business. The accounts and other attendant circumstances vindicate the position. We thus have no hesitation to modify the order of the CIT(A) to this extent. The interest income and similarly discount credits shall thus form integral part of the business receipts and shall be subjected to estimation at same rate of 10% as made applicable to contract receipts. However, the interest income on IT refunds and NSC deposits will not get the benefit of

estimations but will be chargeable as other income in accordance with law.

26. At this juncture, the assessee has claimed that share of profit arising from joint venture in some assessment years are fully exempted from taxation under Section 10(2A) of the Act. Needless to say, where the income is exempt from the ambit of taxation under the provisions of the Income Tax Act, same has to be excluded from the taxability at the threshold. Thus, the AO is directed to do so by determining the taxable income.

27. In the light of the delineation made in the preceding paragraphs, the appeal of the assessee is partly allowed while the appeal of the Revenue is dismissed on all counts.

28. In the result, the appeal of the assessee in ITA No.2554/Del/2022 is partly allowed whereas the appeal of the Revenue in ITA No.2836/Del/2022 is dismissed.

Assessee's Appeal in ITAs No.2555/Del/2022 (2016-17), 2556/Del/2022 (2017-18), 2557/Del/2022 (2018-19), 2558/Del/2022 (2019-20) & 2559/DEL/2022 (2020-21)

Revenue's Appeal in ITAs 2835/Del/2022 (2016-17), 2834/Del/2022 (2017-18), 2837/Del/2022 (2018-19), 2838/Del/2022 (2019-20) & 2839/DEL/2022 (2020-21)

29. Identical grievances have been raised by the assessee as well as by the Revenue in their respective

captioned appeals relating to different assessment years.

29.1 For the reasons mentioned in Assessment Year 2015-16, we affirm the action of the CIT(A) in estimating the net profits at 10% of the receipts from contract business estimated by the CIT(A) after rejection of books of accounts of the assessee. We thus decline to interfere with the action of the CIT(A) on first principles. However, we find merit in the plea of the assessee for applying the principles of estimations on interest income from fixed deposits as well and income received by way of discount arising in the course of business. Therefore, the estimations at 10% on such business receipts by way of interest income from fixed deposits and discount income shall apply *mutatis mutandis*. The action of the CIT(A) is modified to this extent. The Assessing Officer is directed to combine and include the interest income from fixed deposits as well as discount and other business receipts of similar nature for the purposes of estimations of taxable income. The assessee thus gets relief to this extent in tune with the observations made in relation to the Assessment Year 2015-16 (*supra*). All these respective appeals of the assessee are thus partly allowed.

29.2 In short, the facts and the issue being identical, our observations in Assessment Year 2015-16 shall

apply to all other assessment years.

30. For the identical reasons assigned for AY 2015-16, we do not see merit in the grievance raised in the respective Revenue's Appeals. The income assessed by the Assessing Officer has been rightly modified by the CIT(A) subject to the observations made in respect of interest income from fixed deposits and discount income.

31. In the result, all the Revenue's Appeals are dismissed.

32. In the combined result, all the captioned appeals of the assessee are partly allowed whereas all the captioned appeals of the Revenue are dismissed.

Order was pronounced in the open Court on 27/07/2023.

Sd/-
[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER

DATED: **27/07/2023**

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER