आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

ITA Nos.73 to 75/Hyd/2017		
Assessment Years: 2008-09 to 2010-11		
Nagarjuna Construction Company Ltd (NCCL) Hyderabad	Vs.	Dy.CIT Central Circle 1(1) Hyderabad
(Appellant) PAN:AAACN7335C		(Respondent)
ITA Nos.77 to 80/Hyd/2017		
Assessment Years: 2008-09 to 2011-12		
Dy.CIT Central Circle 1(1) Hyderabad	Vs.	Nagarjuna Construction Company Ltd (NCCL) Hyderabad PAN:AAACN7335C
(Appellant)		(Respondent)
Assessee by:	Shri Vijay Mehta, CA & Advocate S Rama Rao	
Revenue by:	Shri K. Madhusudan, CIT(DR)	
Date of hearing:	03/01/2024	
Date of pronouncement:	31/01/2024	

ORDER

PER BENCH:

The above seven appeals are filed by both the assessee and the Revenue. ITA Nos.73 to 75/Hyd/2017 filed by the assessee are directed against the separate orders dated 29.08.2016 of the learned CIT (A)-11, Hyderabad relating to A.Ys.2008-09 to 2010-11 and ITA Nos.77 to 80/Hyd/2017 filed by the Revenue are directed against the separate orders of the learned CIT (A)-11 Hyderabad relating to A.Y 2008-09 to 2010-11 respectively. Since identical issues are involved in the above cross appeals filed by the assessee and the Revenue for the respective AYs, therefore, for the sake of convenience, these were heard together and are being disposed of by this common order.

2. First, we take up appeal in ITA No.73/Hyd/2017 for the A.Y 2008-09 filed by the assessee as the lead case and is adjudicated as under.

3. The assessee has raised the following grounds and additional grounds as under:

> *1. The order of the learned Commissioner of Income Tax (Appeals)-11, Hyderabad, is erroneous both on facts and in law so far as it is prejudicial to the appellant.*
>
> *2. The learned Commissioner of Income Tax (Appeals)-11, Hyderabad, has erred in confirming the inadmissible expenditure of Rs.13,42,84,130 relating to the Municipal Corporation of Indore site. The Assessing officer made the entire addition of Rs.13,42,84,130 based on the uncorroborated document seized from the premises of a third party. Without considering the merits of the issue, the learned Commissioner of Income Tax (Appeals)-1 Hyderabad,*

has confirmed the inadmissible expenditure. The entire addition is liable to be deleted.

3. The learned Commissioner of Income Tax (Appeals)-11, Hyderabad, has erred in confirming the inadmissible expenditure of Rs.1,40,000. The entire addition is liable to be deleted.

4. The appellant craves leave to add/ alter/modify grounds which would be necessary for adjudication of the case."

Additional ground:

The learned CIT (Appeals) ought to have granted further benefit of telescoping in respect of the addition made by the Assessing officer (RS. 11,21,87,364/-) and additional income admitted by the assessee (Rs.4,50,55,095/- for the A.Y.s 2010-11 and 2011-12 respectively, aggregating to Rs.15,72,42,459/- while confirming the addition of Rs.13,42,84,130/- (out of 24.69 crores), being alleged unaccounted payment made to Mukesh Sharma.

3.1 Facts of the case, in brief, are that the assessee company derives income mainly from construction business. It filed its return of income for the A.Y 2008-09 on 8.12.2009 admitting an income of Rs.123,63,87,980/- and the same was processed u/s 143(1) on 09.03.2010.

4. M/s Nagarjuna Construction Company (NCCL) was incorporated on 22-3-1990 as a limited company. Sri Alluri Venkata Satyanarayana Raju promoted the assessee Company. The company took over the ongoing business of a partnership firm M/s Nagarjuna Construction Corporation and commenced its business on 22-03-1990. The company is engaged in the business of undertaking various civil, electrical and structural steel works for (1) irrigation projects, (2) roads and bridges and (3) various types of fast-track turnkey projects. The company is undertaking these projects under various divisions such as engineering division, light engineering division, real estate division, windmill division and cement division. In the recent past, the company has

embarked upon a restructuring program by hiving-off cement and windmill divisions and focusing upon infrastructure related areas like roads and bridges, M/s NCCL has 38 subsidiary companies, out of which the prominent companies are as follows:

(a) M/s NCC Urban Infrastructure Ltd
(b) M/s NCC Infrastructure Holdings Ltd
(c) NIC Avenues Pvt. Ltd
(d) Himachal Sorang Power Ltd
(e) NCC Power Projects Ltd etc.

5. A search and seizure operation was conducted in the residential premises of one Sri Mukesh Sharma at Bhopal in July 2008 by the Directorate of Investigation, Bhopal. On the day of search certain slip pads and scribblings relating to M/s. Nagarjuna Construction Company Ltd. were seized from his premises. These loose sheets and slip pads contain payment of a certain percentage of contract amounts payable to various persons. The slip pads also contain the names of two companies viz., M/s. Nagarjuna Construction Company Ltd and another company. These slip pads also mention the contract value awarded to M/s. Nagarjuna Construction Company Ltd. as 266.87crores. Inquiries revealed that the company M/s. Nagarjuna Construction Company Ltd. had been awarded contract works by the Govt. of Madhya Pradesh. Subsequently investigations were made. Various documents and evidence gathered by the DDIT (Inv.) Bhopal were forwarded to the Investigation Wing of Hyderabad.

6. Further, on 31.10.2009, search and seizure operation were carried out in Madhu Koda Group of cases. During the course of search, it was gathered that the company M/s. Nagarjuna Construction Company Ltd (NCCL) had made inadmissible expenditure by making payment to various persons in the guise of payments to sub-contractors and other expenditures. Hence, a survey operation u/s. 133A of the Income-tax Act was conducted on 25.01.2010 in the case of the assessee company.

7. Subsequently, Search and Seizure operation u/s 132 of the I.T Act, 1961 was conducted in the cases of M/s. Nagarjuna Construction Company Limited and others covering the business and residential premises of the group on the strength of the warrants of authorization issued by the Director of Income-Tax (Inv), Hyderabad. During the course of search and seizure operations, incriminating evidence relating to the unaccounted income generations and investments thereof, of this group, were found and seized. Consequently, field enquiries and examination of connected persons were conducted. This resulted in an admission of undisclosed income of Rs.132,94,25,643/- by this group.

8. Accordingly, a notice u/s 153A of I.T. Act, 1961, was issued on 22-02-2011 for A.Ys. 2005-06 to 2010-11 and the same was served on 25.02.2011. In response to the above notice the assessee filed the return of income on 28.03.2011, admitting an income of Rs.1,32,54,31,318/-.Notices u/s 143(2) and 142(1) along with questionnaire were also issued to the assessee in

response to which Sri PR Datla, FCA and Sri M. Sriram, Taxation Manager appeared before the Assessing Officer from time to time and filed the information called for. The information furnished was verified with the return of income and accordingly, the assessment was completed determining the total income of Rs.1,82,78,53,296/-. The Assessing Officer made disallowance of Rs.35,32,06,010/- u/s 80IA and also made disallowance of Rs.13,42,84,130/- towards inadmissible expenditure.

9. Feeling aggrieved with the order of Assessing Officer, the assessee filed the appeal before the ld.CIT(A) who had upheld the disallowance of inadmissible expenditure of Rs.13,42,84,130/- and allowed the deductions u/s 80IA of the Act for Rs.35,32,06,010/-. Now the assessee and Revenue both are in appeal as per the grounds mentioned hereinabove.

10. The ld. AR, at the outset, drew our attention to para 4.10 of the order passed by the Assessing Officer wherein he disallowed an amount of Rs.9.57 crores and added the said amount to the income of the assessee. The relevant para of the Assessing Officer is reproduced hereunder :

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4.10 In view of the above, summouns u/s 131 was issued to explain the genuineness of these transactions. In response, ShriA.G.K Raju, Executive Director of the assessee company had replied on 20-12-2010 as follows:

"3.As we submitted the company has executed several jobs in Bhopal and Indore. While executing the project situated at Indore, the company has awarded certain works to the following sub-contractors:

a) Tirupati Traders

Hyderabad A.Y. 2008-09

b) RR Enterprises
c) Vinit Enterprises
d) R.P.Traders
e) Suneeth Enterprises
f) Om Sai Enterprises and
g) Ashok Agencies

4. In this regard, following facts are submitted for your kind consideration:

i) It is known fact that the volume of work executed by the company is substantial, its nature is complex, situs of the work is spread across the country and many times in hostile and unfamiliar locations. Therefore, in the process of execution of work, it has to factor all these practical situations for smooth execution of the work.

ii) It is submitted that the pattern of business comprises in executing contract on its own, through sub-contractors, job workers and piece rate workers. Considering the nature of work and location of work, the sub-contractors and job workers have to be finalized for timely completion of the works. They are mostly drawn from locals with the hope that there would be no impediment in execution of work.

iii) The works executed by the sub-contractors in Bhopal is one of such works. The total value of the works executed by all sub-contractors as mentioned above is an amount of Rs.9,68,16,191/-.

iv) While awarding work to the above mentioned parties, the company had exercised due diligence as a prudent business man is expected to do and ensured

(a) proper method of awarding the job,

(b) ensuring payments by account payee cheques while finalizing the bills for the works executed so that the recipient could be an identifiable entity

(c) ensuring that the tax is deducted at source from such payments

(d) remittance of TDS to Government

(e) filing of tax deduction at source quarterly returns.

As far as the assessee could remember all the subcontractors have produced proof that they were assessed to tax.

v) The sub-contracts have been awarded work considering the locational advantage of the respective persons. The expenditure incurred on these sub-contractors are a part of the project execution expenditure. At no

point of time, there could be any diversion of such expenditure for any other purpose.

vi) *All the transactions with the sub-contractors were duly recorded with the books of account regularly maintained by the company.*

vii) *Despite taking all the above precautions and following the due procedure, it would not be possible to retain some of the sub-contractors and job workers forever. Some of them could be the fly by night operators. However, considering their strength in the project work location and their contacts and connections with the locals to overcome certain problems in implementing the project, the company had to award certain works to these sub-contractors. These are practicalities of the contract business which cannot be ignored.*

5. *At this juncture it is our submission that, all the sub-contractors were awarded work considering the local problems and keeping in mind the timely completion of the project. Since they have been awarded work considering the locational advantage and they were also operating from that location, they were not associated with the company for any other projects subsequently.*

6. *In view of the above mentioned factors, it may not possible for the company to produce them before the department for taking further evidence. However, the company has taken due care to ensure the process of their selection, by making the payments through account payee cheques which ensures their identity as the banks follow strict procedure for opening bank accounts, by making TDS from the payments made to them. This is what a tax payer could do in the situation prevailing while executing a work in places which may be quite unfamiliar. Thus, the company has established the genuineness of the transaction and identity of the persons. It is submitted that the law does not require the assessee to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of facts in issue. The legal proof is not necessarily a perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. Judged from this perspective, the assessee has discharged the burden.*

7. *As we explained, the company has incurred the expenditure for meeting the business requirements of the project. However, considering the inability to produce the evidence to the desired level at a distance of time as required by the department and to give a quietus to litigation which may ensure in the process of evaluation of evidence viz, production of witnesses, examination, cross examination etc, which is time consuming and vexatious, and In the best interest of the business of the company to put at rest the matter, the total amounts paid to the sub-contractors is offered to tax as Income to be assessed/reassessed U/s 153A of the Income Tax Act, 1961. The year wise income to be assessed/reassessed is as follows:*

S.NO.	Financial Year	Asst. Year	Amount(Rs.)
1	2007-08	2008-09	71373002
2	2008-09	2009-10	25443273
	Total		96816275

Addition as admitted by the assessee in respect to payment to sub-contractors inadmissible according to the assessee.

Penalty proceedings u/s 271(1)(c) of the Act are initiated for furnishing inaccurate particulars of income and concealment of income in this regard.

Admitted addition Rs. *7,13,73,002/-*

11. The learned AR thereafter drew attention of the Bench to para 4.12 of the order passed by the Assessing Officer wherein the Assessing Officer mentioned as under:

4.12 In this connection, it is to be stated that in the course of survey proceedings conducted simultaneously along with the search proceedings, a loose sheet vide PageNo.68 of Sl.No.9 was impounded from the office premises of the assessee-company at Bhopal. The loose sheet contained details of payments to be made for a project under Indore Municipal Corporation (IMC-Sewerage) Project to various officials. A copy of the loose sheet is reproduced as under:

-Left intentionally-

NAGARJUNA CONSTRUCTION COMPANY LTD

IMC-SEWERAGE WORK INDORE

MISC.EXP PAYMENT DETAILS

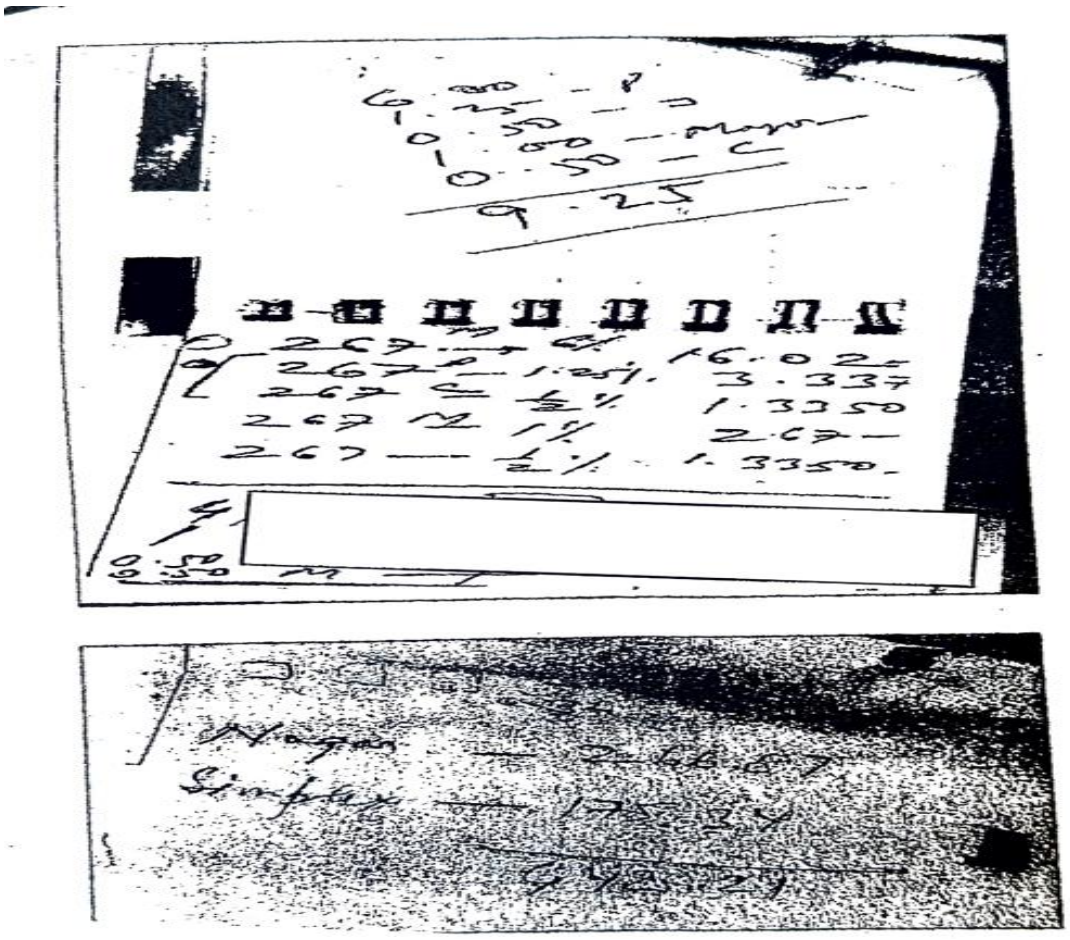
S.No	NAME	percentage
1	Commissioner	0.75
2	Add.Commissioner	0.50
3	Superiendent Eng	1.50
4	Project Officer(CENTRAL)	0.50
5	Project Office (east)	0.50
6	Audit Dept	0.30
7	CONSULTANTS HEAD OFFICE	0.75
8	Asst Engineer (central)	0.50
9	Sub Engineer (central)	0.50
10	Sub Engineer (central)	0.50
11	Asst Engineer (eastl)	0.50
12	Sub Engineer (east)	0.50
13	Sub Engineer (east)	0.50
	TOTAL	7.80
	Monthly Lumsum for Consultants	
1	Team Leader (consultants)	60000.00
2	Asst.Team Leader (consultants)	40000.00
3	Ashish jain(consultant)	20000.00
4	Veda Prakash (consul)	20000
5	Patak (consul)	20000
6	Alok Jain (consul)	20000
7	Sachitanand (consul)	20000
8	Sharma (consul)	20000
	Note: Payment for Extra Mesurements for Consultants - 20% and Claints - 25%,	

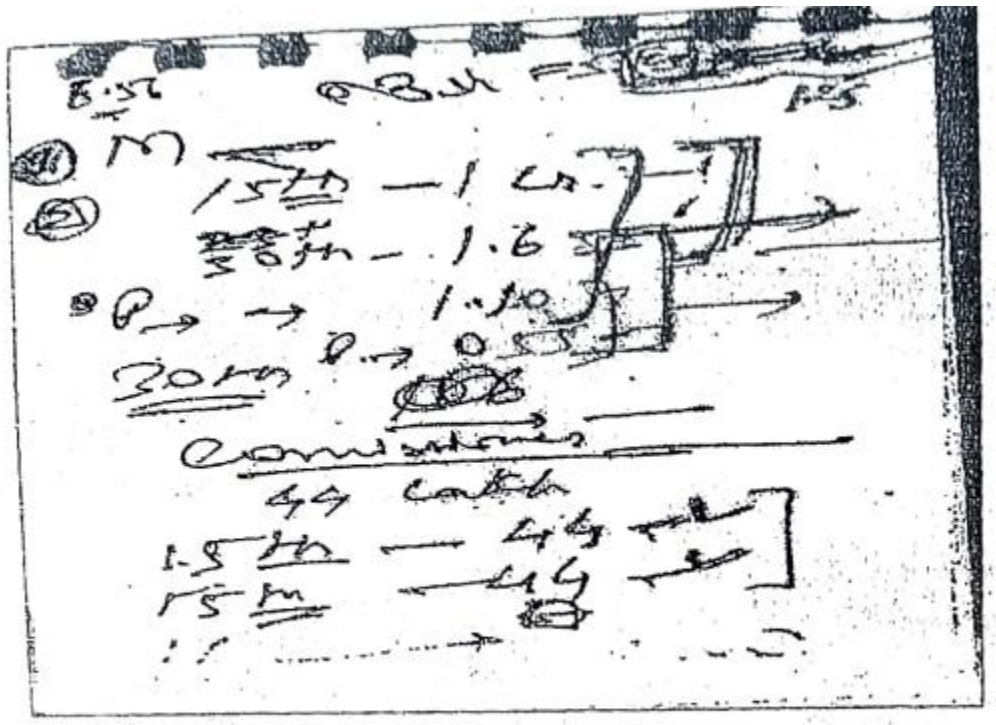
12. It was further submitted that the assessee had requested the Pr. Secretary, Urban Development Department, Bhopal to release the payment to the tune of Rs.146 crores as on 11.06.2010. It was the contention of the assessee that up to the A.Y 2011-12 total work executed by the assessee was to the

extent of Rs.125 crores. The year-wise details of the work completed was as under:

Sr.No.	Assessment Year	Total turnover for the year	Cumulative turnover for the year
1	2009-10	27,52,67,209	27,52,67,209
2	2010-11	50,01,64,352	77,54,31,561
3	**2011-12**	**48,18,80,243**	**1,25,73,11,804**
4	2012-13	24,97,02748	1,50,70,14,552
5	2013-14	13,96,47,248	1,64,66,61,800
6	2014-15	1,46,83,579	1,66,13,45,379
7	2017-18	-3,82,53,080	1,62,30,92,299
	Total	**1623092299**	

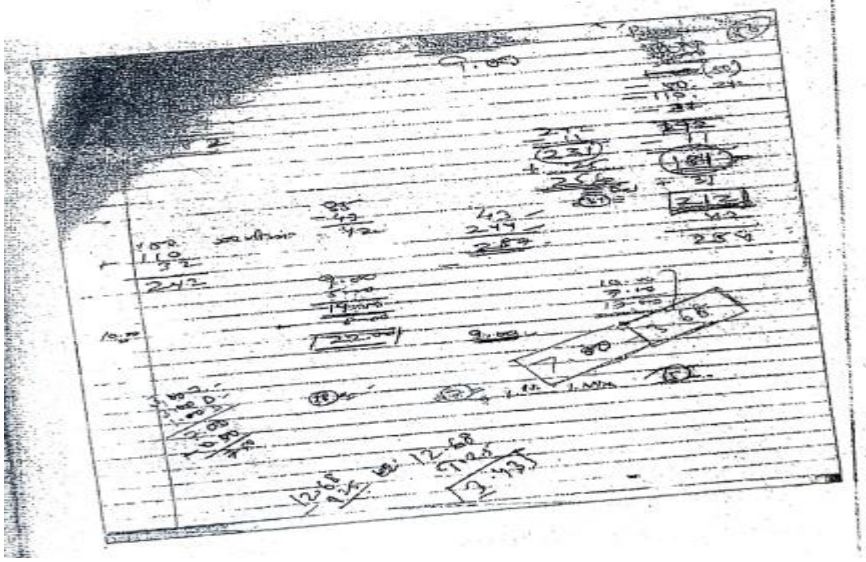
13. The learned AR submitted that the Assessing Officer in Para 4.14 has reproduced the seized material seized from the premises of Mr. Mukesh Sharma and others at Bhopal and the following document at page 23 to 25 of the order referred to:





5. LPS 25 pg 9 is copy of interoffice memo dtd 12.3.08 of Nagarjuna construction company found at the residence of Mukesh Sharma at the time of search.

LPS 1/1 **Residence of Mukesh Sharma pg155 ix and viii backside, xxi backside** shows that commissions have been received from the two companies by Minister and officials (Principal secy, Urban administration and development; Commissioner, Urban administration and development; Mayor , Commissioner nagar nigam), which is a certain percentage of the contract given to these companies namely M/s Simplex infrastructure ltd and M/s Nagarjuna Construction company. M/s Simplex infrastructure ltd and M/s Nagarjuna Construction company. Various tranche of receipt of the commission are mentioned in the slip pads



14. The typed copy of the page 23 is as under:

6.00
1.25
0.50
1.00
0.50
9.25
====

15. The learned AR submitted that the Assessing Officer had made the addition of Rs.24.70 crores which is 9.25% of the contract value of Rs.267 crores as the illegal payment alleged to have been made by the assessee to various persons named at page 23 (Supra). For the above said purposes, the learned AR drew our attention to Para 4.20 of the assessment order which is to the following effect:

"4.20. Subsequently, the company was informed that the reply was not acceptable from the loose sheets as well as circumstantial evidence it could be inferred that an amount of Rs. 24.70 crores ie., 9.25% of Rs. 267 crores of contract value must have been illegal payments. Hence, it was proposed to tax the balance amount from Rs. 24.70 crores. The assessee-company was asked to state its objections, if any, to the above proposal.

16. The Assessing Officer in Para 4.23 had noted the submission of the assessee whereby the assessee had submitted that the assessee had disallowed the contract payment made to the subcontractor for the amount of Rs.1,48,99,595/-. It was contended by the LD.AR that the Assessing Officer had made the addition of Rs.13,42,84,130/- in the hands of the assessee in the A.Y 2008-09, after giving the adjustment of the payment admitted by the assessee as mentioned herein above for an amount of Rs.7,13,73,002/- and Rs.1,48,99,595/- on the pretext that the assessee has made the illegal payment upfront for the

grant of award by the Indore Municipal Corporation. The finding of the Assessing Officer is given in para 4.28 which is to the following effect:

> *"4.24. Thus the assessee company had admitted as its income by way of payments made to sub-contractors, the commission payments made to politicians and bureaucrats though it continued to deny any link of these payments with the incomes admitted.*
>
> *4.25. From the detailed investigations made by the Bhopal Unit and the evidences seized from the residence of Sri Mukesh Sharma clearly point out that there is a - definite link between the' contracts awarded by M.P.Government to the assessee-company and the percentage of commissions paid to politicians and bureaucrats as could be seen from the copies of documents which are reproduced above. It is true that in all such cases no direct evidence linking both can be found. But the overwhelming circumstantial, evidence clearly brings out the nexus between the persons responsible for awarding government contracts and the assessee -company. In all such cases, the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities.*
>
> *The transaction of. taking commissions for awarding government contracts takes place in secret and direct evidence about payment of such commission would be rarely available. An inference about such a transaction has to be drawn on the basis of the circumstances available on the record. Having' regard to the conduct of the assessee company as disclosed in their bank statement as noted above and also the sworn statements of the Directors' of the assessee-company as well as other material on record an inference could easily be drawn that the assessee-company paid the percentage of commission amounts as was noted in the seized diaries of Mukesh Sharma. As has been. held by the Supreme Court in the case of Sumati Dayal 214 ITR 801 (1995) SC "This raises the question whether the apparent can be considered as the real. As laid down by this court the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities……."*
>
> *"..The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase*

would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn-statement as well as other material on record an inference could easily, be drawn that the winning tickets were purchased by the appellants after the event.

4.26 In the case of Commissioner of Income-tax, West Bengal-Il Vs. Durga Prasad More 82 ITR 540. The supreme Court has stated that the taxing authorities are not required to put on blinkers while looking at the documents produced before them. It said that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.It said in the above case "science has yet invented any instrument to test the reliability of the evidence placed at before a court or a tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities.."

4.27 Thus from the above it can be seen that the Highest Court of the land has also upheld the principle that even though no direct evidence is found yet basing on human probabilities and the surrounding circumstances the taxing authorities have to arrive at the truth. In this case apparently there is no connection between the commission payments and the expenditure booked by the assessee company. However, the surrounding circumstances clearly point out that there is a nexus between these two. Accordingly, the balance amount of 9.25% of the contract of Rs.266.89 crores which has not been admitted by the assessee-company is added to the returned income.

4.28 As regards the year of addition though in the show cause letter issued to the assessee on 22.02.2013 as to why it should not be assessed in the Asst. Year 2009-10, since the transactions took place during the period of March, 2008 and April, 2008, the year can be either financial year 2007-08 relevant to the Asst. Year 2008-09 or financial year 2008-09 relevant to Asst. Year 2009-10. Since the contract NIT MP 20/JNNURN/IMC dt. 01.10.2007 for contract price of Rs. 123,73,35,337 was awarded by Indore Municipal Corporation, Indore by their date of order dt. 27.02.2008 and another contract for Rs.143,14,25,454/-was awarded by the Indore Municipal Corporation, Indore vide their date of order dt. 27.02.2008, the financial year is taken as 2007-08 relevant to Asst. ear 2008-09. Moreover, the agreement was also signed between the two parties in the financial year 2007-08 and hence, the addition is made for the Asst. Year 2008-09.

*Addition of Rs.**13,42,84,130/-.”***

17. The learned CIT (A) has decided the issue from para 2.6.13 to 2.6.15 which reads as under:

"2.6.13 Before choosing to place reliance the Supreme Court decision in the case of Sumati Dayal and the case of Durga Prasad More the Assessing Officer notes the seized material in situ has to be seen as circumstantial evidence. This stand has to be upheld since it is in the very nature of such transactions that there would be no direct evidence. That the scope of evidence under the Income-tax Act is wider than what is understood under the Evidence Act is well known. Evidence under the Income-tax Act can go beyond direct evidence to include material gathered by the Assessing Officer in an enquiry or material which is within his personal knowledge or such other material that may come into his possession subject only to the fetters placed by the principles of natural justice. The Supreme Court decision in the case of C. Vasantlal & Co. v. CIT: (1962] 45 ITR 206, or the A.P. High Court in the case of Yaggina Veeraraghavulu and Mavuleti Somaraju & Co v.CIT [1966] 62 ITR 528-535, among others underscore this point. As held in the case of Dhakesh wari Cotton Mills Ltd. v. CIT: (1954] 26 ITR 775, 785 (SC), the only fetter on the Assessing Officer acting on material that would otherwise be unacceptable to a court of law is that he should act honestly and fairly and not indulge in pure guesswork in the act of making an assessment. That the Assessing Officer may take cognizance of a wider variety of facts than permitted under the Evidence Act is also recognized by the Delhi High Court in the case of Addl. CIT V.Jay Engg. Works Ltd{1978] 113 ITR 389. (".evidence in income-tax proceedings need not consist necessarily of evidence admissible under the Evidence Act but may consist of other material which has a probative value, the Tribunal was justified in taking such material into account "). In the light of the above the Assessing Officer's action amount in holding that the aforesaid of Rs.13,42,84,130/- has to be added back as a measure of preponderant probabilities suggested by circumstantial evidence has to be upheld.

2.6.14 The Assessing Officer brings this amount of Rs.13,42,84,130/- to tax in the A.Y.2008-09. He reasons that though the transactions had taken place in March, 2008 and April, 2008 (relevant for A.Y.2008-09 & A.Y.2009-10), the Indore Municipal Corporation has awarded both contracts one for Rs.123.73 crores and another contract for Rs.143.14 crores, on 27.02.2008. It was therefore decided to bring the amount to tax in the financial year 2007-08 relevant to A.Y. 2008-09. It is seen, ***however, from the impounded material placed at page 19 & 20 of the assessment order that the assessee company - even as on 11.06.2010, is requesting the Principal***

Secretary, Urban Development, Govt. of Madhya Pradesh to instruct the local Indore Municipal Authorities *"to release balance scope of work (Rs.146 crores) immediately" so as to complete the project within time. It is further seen vide para 4.10 of the assessment order that the Executive Director of the assessee company in a response* ***u/s.131 stated that while executing the project at Indore the claim for expenditure incurred by the Company in works awarded to certain sub-contractors of whom seven were identified, was being withdrawn.*** *This amount related to a sum of Rs.7,13,73,002/- in F.Y.2007-08 (A.Y.2008-09) and Rs.2,54,43,273/- in F.Y.2008-09 (A.Y.2009-10). Following up, in the assessment proceedings - where the assessee in the face of an enquiry by the Assessing Officer found it necessary to withdraw certain expenditure claimed in the same Indore project for similar reasons, the admission related to F.Y.2008-09 (A.Y.2009-10) amounting to Rs.1,18,16,873/- and F.Y.2009-10 (A.Y.2010-11) amounting to Rs.30,82,722/-. The fact that such unverifiable payments are being identified across multiple assessment years can sustain a reasonable hypothesis of cash outside the books deployed for unstated purposes including those identified by seized/impounded material discussed above in more than one assessment year.*

2.6.15 While the nature of expenses incurred relevant to the Indore project would tend more to being loaded upfront rather than continue as a recurring expense, the fact remains that the work tends to receive administrative scrutiny in phases - as suggested for instance by the material referred to at para 4.13 on page 19 & 20. Under the circumstances it would accord well with the facts noticed in the assessment order to bring this amount to tax across A.Yrs, 2008-09, 2009-10 & 2010-11. Adopting the unverifiable expenses admitted by the assessee as an objective yardstick, the disallowance made on this count should be adopted in the proportion of 7.14/3.72/0.31 across A.Yrs. 2008-09, 2009-10 & 2010-11. The Assessing Officer is, therefore, directed to assess an amount of Rs.8,58,36,050/- in A.Y.2008-09, Rs.4,47,21,300/- in A.Y.2009-10 and the balance amount balance amount of Rs.37,2 6,780/- in A.Y.2010-1 1, for the reasons discussed at paras 4.12 to 4.28 in the assessment order for A.Y 2008-09. In effect Ground No.3 is dismissed".

18. Feeling aggrieved with such order of the learned CIT (A) the assessee is in appeal before the Tribunal.

19. It was pointed out by the learned AR that the entire amount of Rs.13,42,84,130/- as taken by the Assessing Officer for the A.Y 2008-09 at para 4.28, was distributed for 3 A.Ys i.e.

A.Y 2008-09 to 2010-11 respectively and against that the Revenue is not in appeal before the Tribunal.

20. The learned AR referring to the additional ground submitted that for the A.Y 2010-11, the assessee has admitted the amount of Rs.11.21 crores and for this amount the assessee is entitled to telescoping in the AY 2008-09. He had drawn our attention to the finding of the Assessing Officer in the AY 2010-11 which is as under:

> *"1.5*
> *.....*
>
> *After the enquiries, the assessee filed a revised return on 31.12.2012 admitting income of rs.11,21,87,364/-. The revised total income came to Rs.255,06,22,375/-. Penalty proceedings u/s 271(1)(c) are initiated separately for not disclosing the same in the original return filed on 15.10.2010."*

21. Similarly for the A.Y 2011-12 at page 8 and para 5, the assessee had also admitted an amount of Rs.4.50 crores during the assessement proceedings and for this amount the assessee is entitled to telescoping in the AY 2008-09. He had drawn our attention to the finding of the Assessing Officer in the AY 2011-12 at page 8 and para 5 is as under:

> *"5.1 In the course of search proceedings, Shri A.A.V. Ranga Raju in his statement dated 07.10.2010 (S.No.11 of Annexure-II) stated that an amount of Rs.65 crores was being admitted as undisclosed income in the hands of assessee company. He has further stated that he will furnish the breakup of this disclosure assessee year wise after verifying the entire seized material. In the course of post search proceedings, Shri A.A.V. Ranga Raju has made an admission of only Rs.60,49,44,910/- related to the seized material. In view of this, Shri AAV Ranga Raju was asked to explain the discrepancy. In response Shri AAV Ranga Raju in his sworn statement dated that after verifying the seized material and considering the issues emerged during the course of post search proceedings, the income pertaining to the financial years 2005-06 to 2009-10 and up to the date of search i.e., 1st April,*

2010 to 6th October, 2010 was arrived at Rs.60.50 crores. He stated that however, considering the complexity of works the company is handling the issues emerged out of the proceedings an additional amount of Rs.4,50,55,095/- is admitted to tax during the financial year 2010-11 to meet all the eventualities that may arise. In view of this an amount of Rs.4,50,55,095/- is further admitted in the hands of assessee company for the assessment year 2011-12.

5.2. The assessee honoured its commitment and included the amount of Rs.4,50,55,095/- to meet all the eventualities that may arise.

22. The contentions of the assessee are as under:

i) When the Assessing Officer is required to restrict the illegal amount paid by the assessee only with respect to the corresponding contract completed by the assessee, i.e. in the present case, the contract completed by the assessee was for Rs.125 crores therefore, the Assessing Officer should have taken 9.25% of the said amount as the illegal amount and therefore, the action of the Assessing Officer to take 9.25% of the total contract value of 267 crores pegging at Rs.24 crores was incorrect.

ii) In alternate, it was argued that even if the amount as decided by the Assessing Officer is of Rs.13 crores which was later on modified by the learned CIT (A) to Rs.8,58,36,050/- for A.Y 2008-09, Rs.4,47,21,300/- for the A.Y 2009-10 and Rs.37,26,780/-for A.Y 2010-11, the assessee is entitled to telescoping of the amounts of Rs.11.21 crores and Rs.4.50 crores which was admitted by the assessee in the AY 2010-11 and 2011-12 in the AY 2008-09.

iii) It was submitted by the learned AR that no additions were made in the hands of the assessee on the basis of the documents found from the premises of the assessee as mentioned

by the Assessing Officer in para 4.1.2 and the addition allegedly made was on the basis of the document found from the premises of the 3rd party which cannot be relied upon as the said document was dumb document.

iv) Further, it was submitted that the said document is incomplete as neither date nor the name, nor any other descriptions are mentioned in the document at page No.23 and 24 of the assessment order.

v) It was further submitted that the Assessing Officer himself was not sure whether the amount mentioned in the slip was actually paid or not as in para 4.12 and para 4.14, the Assessing Officer himself has mentioned that the "payments are to be made to various persons".

vi) It was submitted that once the Assessing Officer was not sure whether the payments were actually made or not then it is not possible and permissible to make addition on the basis of the surmises and conjectures. It was submitted that the reliance of the Assessing Officer and the learned CIT (A) in the case of Durga Prasad More is without any basis.

23. The ld LD.AR had also filed the following written submission in support of the ground and additional ground which is as under:

> *"Gr. 2: Addition of Rs. 13,42 cr. being payment outside the books of account. The Assessing Officer has held that the assessee has incurred cash expenditure outside the books of account amounting to Rs. 13.42 cr. Based on the material recovered from the premises of one Mr. Mukesh Sharma, during the course of search in July 2008, the Assesisng Officer concluded that the assessee must have paid commission of Rs. 24.60 cr. outside the books of*

account being 9.25% of contract value of Rs. 266.87 cr. The Assessing Officer further observed that the assessee has offered to tax certain alleged bogus expenses of Rs. 11.17 cr. (Rs. 9.68 cr. And Rs.1.49 cr) and the payments to that extent are treated as explained. Accordingly, he has made the addition of balance amount of Rs. 13.43 cr. (Rs. 24.60 cr. - Rs. 11.17 cr.) for the year under consideration. The Ld. CIT(A) has redistributed the amount of addition of Rs. 13.43 cr. for A.Y. 2008-09 (Rs. 8.58 cr.), for A.Y. 2009-10 (Rs. 4.47 cr.) and for A.Y, 2010-11 (Rs. 0.37 cr).

3. It is submitted that the above addition is unsustainable for the following reasons:

(i) The seized documents have been found from the premises of a third person i.e. Mr. Mukesh Sharma.

(ii) No statement of Mr. Mukesh Sharma or any other person have been recorded during the course of search or thereafter.

(iii) The documents, on the face of it, contains rough jottings without any details of whether the transaction is in lakhs or crores, cash or cheque, lump sum or in instalments etc. The details of who has paid the cash, to whom and when is missing.

(iv) There is no evidence of any actual cash payment and the entire addition is based on so-called circumstantial evidence. While admitting several other transactions during the course of search at the premises of the assessee, the aforesaid transaction has been outrightly denied by the assessee.

(v) The Assessing Officer himself has mentioned at several places that there is no direct evidence available and the addition has been made based on inferences. There are several possibilities like the amount represents demand for payment which has not been accepted.

(vi) Even in respect of clearcut seized documents, the courts have held that, there has to be corroborative evidence. In the present case, admittedly, there are no corroborative evidence.

(vii) In the absence of any statement of the person from whose custody the seized document has been found out (and thereby ruling out possibility of any cross-examination) and in the absence of any corroborative evidence, the addition made by the Assessing Officer do not pass legal test of sufficient evidence and, hence, needs to be deleted.

(viii) The very fact that the departmental authorities are not certain about the years of payment, clearly shows that there are no evidence about the payment.

4. Without prejudice to the above and strictly in the alternate, it is submitted that the authorities below have erred in holding that the assessee would have paid the commission on the entire

contract amount of R.s 266.60 cr. The contract was completed to the extent of Rs. 126 cr. during A.Ys. 2008-09 to 2010-11, which are the years under consideration. There is no question of making upfront payment of commission on the entire amount. The assessee, seasoned businessman was fully conscious about the fact that there is no certainty of getting the full contract work and the same is going to take few years for completion. The addition should be restricted to 9.25% of Rs. 126 cr., which comes to Rs. 0.49 cr. (Rs. 11.66 cr. - Rs. 11.17 cr.).

5. Further without prejudice to the above and strictly in the alternate, it is submitted that in respect of residual addition if any, the set off may be given in respect of additional income declared by the assessee as under:

(i) Rs. 11,21,87,364/- in A.Y. 2010-11 (page no. 3 to 5 of assessment order).

(ii) Rs. 4,50,55,095/- in A.Y. 2011-12 (page no. 8 of assessment order).

6. It is submitted that the amount of Rs. 11.21 cr. has been added in A.Y. 2010-11 and the nature of addition and the underlying transactions are identical to that of additions of Rs. 9.68 cr. and Rs. 149 cr. (in respect of which set off has been granted by the Assessing Officer himself). Since the above amount has already suffered a tax, the benefit of telescoping against the alleged commission payment may kindly be granted to the assessee. It is submitted that otherwise it would result into double addition. In a similar manner, the assessee has declared Rs. 4.50 cr. in A.Y. 2011-12 to cover up any other error or omission arising out of the search proceedings. The declaration made by the assessee clearly reveals that the same was without reference to any specific item (copy of the statement is on record). The discussion of the Assessing Officer in the assessment order for A.Y. 2011-12 also establishes that the declaration was general without reference to any specific item. Since the declaration was made to cover up any error or omission arising out of search, the benefit of set of may kindly be granted to the assessee in order to avoid double taxation."

23.1 Per contra, the learned DR submitted that in fact the two separate payments are made by the assessee i.e., as mentioned in page 25 i.e. 9.25% and the other payment of 7.80% (Para 4.12 of Assessing Officer) of the contract value. It was submitted that the payment of 9.25% was to be paid for grant of the contract and was paid upfront and the Assessing Officer was right in making the addition in the hands of the assessee.

Further, it was submitted that the Assessing Officer was generous in not making the addition in the hands of the assessee for the payments referred to in the documents seized from the premises of the assessee as mentioned in para 4.1.2 of the order. The learned DR also relied upon the presumption u/s 292C that is required to undertake against the assessee as the document was found from the premises of the assessee referred to in para 4.12 and therefore, the contents thereof are required to be true. The learned DR further relied on the decisions of Hon'ble Supreme Court in the case of Sun Engineering (supra) to buttress that the assessee cannot be permitted to claim the deduction against the payments illegally made by the assessee. It was submitted that the rigors of section 37 are only applicable if the expenses are incurred wholly and exclusively for the purpose of business. It was submitted that the illegal payments made for grant of contract is not required to be allowed and therefore, the lower authorities are correct in their adjudication. The ld.DR had also filed the written submission in support of the case of the Revenue which is as under:

> *"A search was conducted in the case of Shri. Mukesh Sharma by the Bhopal unit of the department in July 2008 where in certain incriminating documents/loose slips relating Nagarjuna Construction Company Ltd. were found and seized which are appearing on page no 22 to 25 of the Assessment Order. As a consequential action, a survey and search actions were conducted in the case of the assessee NCC Ltd. in January 2010, where again certain incriminating documents were found and seized. One such page is appearing on page 18 of the assessment order, legible copy of which was filed by the Ld.AR of the appellant while arguing his case before the Hon'ble Tribunal.*
>
> *2. Main issue relates to the addition of Rs. 13,42,84,130 made by the AO in the AY 2008-09 while passing the order us 153A r.w.s. 143(3) of the Act. The AO discussed the issue and his conclusions are in paragraphs 4.24 to 4.28 of his order. The ld.CIT (A) discussed the issue, arguments of the assessee on page nos. 3 to 17 of his order in para 2 and his conclusion are in paragraphs 2.6.14 and 2.6.15 of the order.*

3. The AO, based on the incriminating documents extracted at page 23, 24 of the order and other evidences arising out of searches held that the appellant has paid 9.25% of the total contract work order granted by the Indore Municipal Corporation (IMC) as bribes. This amount was taken out of the receipts credited to P&L a/c by claiming various expenses including sub contracts works given to certain persons and the same is an illegal allowable u/s expenditure, not Indore Municipal 37(1) of the Act. Total contract work granted by the Corporation was Rs 266.87 Cr and 9.25% of the same works out to Rs. 24.7 crores. After giving a show cause notice, the Assessing Officer concluded that Rs.24.7 Crores is an unexplained expenditure. During the search and post search investigation, the director of the assessee company accepted the amount debited against the names of subcontractors in the statements recorded and offered to tax in the ROI filed u/s 153A of the Act. The AO, out of the unexplained expenditure quantified at Rs.24.7 cr. gave credit to Rs11.17 cr. admitted by the assessee in the ROI and made addition of Rs.13.43 cr. as unexplained expenditure in the assessment for AY 2008-09. The assessee inter-alia contested the addition before the CIT (A).

4. The ld.CIT (A) confirmed the addition made by the AO, but distributed the addition of Rs. 13,42,84,130 made by the AO in the AY 2008-09 into Rs. 8,58,36,050, Rs.4,47,21,300 and Rs.37,26,780 for AYs 2008-09, 2009-10 and 2010-11 respectively. This distribution/bifurcation is contested by the assessee by taking additional grounds in respective assessment years. The department is not in appeal on the bifurcation decision of the ld.CIT(A).

5. The Id.AR of the assessee argued that:
(b) The assesse executed only Rs.125.73 crores works out of the Rs 266.87 works granted by the IMC, therefore the addition at most may be restricted to the works executed during the years relevant to AY 2008-09, 2009-10 and 2010-11.

(c) Admission of Rs. 11.21 crores and Rs.4.50 crores has been made by the A.0 in AY's. 2010-11 and 2011-12, for which set off may be given and the addition made in AY 2008-09 be reduced.

(d) Referring to the seized document on page 22 of the assessment order, the AR argued that though 7.8% is mentioned, is also written on the same page that it cannot exceed 5%, therefore, the percentage 9.25 may be reduced.

6. I have made many oral submissions against the arguments of the Ld AR and the propositions made by him, this same are submitted in writing for kind consideration and extraction in the order as arguments of the department.

(a) With regard to the proposition that percentage of estimation on 266.87 may be reduced, it is submitted that

this proposition may not be accepted for the following reasons:

(b) The paper on which Percentage of 7.8% and 5% are appearing was seized from the office premises of the assessee and the loose slips reproduced on page 23 and 24 of the assessment order on which 9.25% and Nagarjuna 266.87 (total contract value) are mentioned, were seized during the search in the case of Shri. Mukesh Sharma, the liaison/tout/broker working in IMC in getting contract works

(c) As per jotting on the loose sheets the 9.25% of 266.387 crores was paid to the. certain officials at IMC who were involved in granting the contract work of 266.87 to the assessee. This payment was made upfront for granting the contract and it is different from 7.8% mentioned against the Officials in the Engineering department of IMC for releasing the amounts on per the works done during the three years.

(ii) Addition has been made by the AO based on the loose slips at page no 23 and 24 of the order which are actually the payments made to get the total contract granted, so the 9.25% of Rs.266.87 cr which is an upfront payment and this percentage cannot be applied to the actual works done of 125.73 Cr during AY 2008-09, 2009-10 and 2010-11. Therefore, the estimated unexplained expenditure of Rs 24.7 Cr (9.25% of 266.87 Cr) is correct and correctly made by the for contractors including the assessee.

(iv) The argument of the AR that there is direct evidence to make addition of unexplained expenditure is discussed by the AO in his order in para 4.25 on pages 32 and 33 and also the CIT(A) and the relied on the decisions of the Apex Court. In this case there is corroborative evidence in as much as the figures mentioned in the seized documents with actual contract amounts granted by IMC in the name of the assessee.

(v) No addition of 7.8% has been made by the AO in the assessment order, relating the percentages mentioned against the Engineering department (page 22), therefore, question of restricting the addition 7.8% or 5% does not arise.

(vi) With regard to the year of incurring the unexplained expenditure under consideration, the AO based on the dates has made addition in AY 2008-09 and the CIT(A) allocated the same amount for three consecutive assessment years 2008-09, 2009-10 and 2010-11, which the department has not contested in appeal.

(b) With regard to the set off/telescoping claim made by the AR, it is submitted that the assessee company executed 55 projects in the AY 2008-09, 65 projects in the AY 2009-10, 51 projects in 2010-1 1 and 47 projects in the AY 2011-12, which may have required huge unexplained expenditure, for which separate additions have been made by the AO in the relevant AYs based on

the seized documents and admissions by the director of the company. Therefore, credit/set off/ telescoping cannot be given for income admitted in one year against the expenditure of different assessment year, as the income admitted/offered by the assessee actually relates unexplained expenditure incurred during that relevant financial year. Further, the income admitted related to AY 2010-11 and 2011-12 which are later years to AY 2008-09.

(c) Further, each assessment is separate as per the ROI filed under 153A, therefore, no fresh deduction/set off can be given in at this stage. Reliance is placed on SC decisions in the case of M/s. Sun Engineering works Ltd. 198 ITR 297 (SC).

24. We have heard the rival contention of the parties and perused the material available on record and the judgements cited by the respective parties. In the present case, search and seizure action was carried out in the residential premises of one Shri Mukhesh Sharma in July, 2008. During the course of search, certain documents were found relating to the assessee. From the perusal of the documents, it was noticed that the assessee had received two contracts of Rs.266.87 crores and for getting the said contracts, the assessee had made the payment of Rs.9.25% on the contract value to Minister, Officials (Principal Secretary, Urban Administration and Development Commissioner, Urban Administration and Development Mayor, Commissioner Nagar Nigam etc. In the seized documents, the distribution of payments was mentioned as 6% (M) 1.25% (P, 0.25% to (C), 1% to (M) and 0.50% was also paid. Thus, total payments made by the assessee were 9.2% of the contract value i.e., Rs.267 crores. After the search and survey operation was carried out at the premises of Shri Mukhesh Sharma, the documents and evidences were forwarded to the Investigation Wing of Hyderabad. Simultaneously, another search and seizure operation were carried out in Madhu Koda Group of cases. Thereafter, the survey operation u/s 133A was conducted on 25.01.2010 in the assessee's premises. As incriminating documents, evidences

relating to unaccounted income generation and investment were found, the assessee disclosed the income of Rs.132,94,25,643/- as additional income of the group. The proceedings were initiated u/s 153A of the Act after issuing notices to the assessee. During the assessment proceedings, the assessee was called upon to explain the genuineness of the transactions with respect to 16 companies, and in response thereto, the assessee had admitted and disclosed the additional income of Rs.7,13,73,002/- (Paragraph 4.10 of the assessment order). Similarly, the assessee had also admitted when the evidences of bogus expenditure were confronted to the assessee with respect to two sub-contractors namely, Global Construction company and Gaurav Construction company, the assessee had further admitted an amount of Rs.1,48,99,595/- (Paragraph 4.23 of the assessment order).

24.1. We find that the Assessing Officer had confronted the assessee with respect to the loose sheets / documents found from the premises of Shri Mukesh Sharma and a show cause notice was issued to the assessee. In response to the show cause notice, assessee filed a reply and denied any connection with the said Mukesh Sharma. The Assessing Officer relying upon the loose sheets found in the premises of Mukesh Sharma and the other circumstantial evidences had made the addition of Rs.24,60,00,000/- in the hands of the assessee. Since the assessee had already admitted the amount of Rs.9.68 crores as undisclosed income, the Assessing Officer had sought the reply and the assessee vide reply dt.13.12.2012 has objected to the proposal for making the addition of balance amount in its hands. The Assessing Officer after examining the facts of the case had made addition of the remaining balance amount of Rs.13,42,84,130/- in the hands of the assessee. On appeal, the

ld.CIT(A) has confirmed the addition, however, the ld.CIT(A) for the reasons reproduced hereinabove has distributed the amount in three assessment years and the Revenue is not in appeal against the said distribution.

24.2. Before us the contention of the assessee as mentioned hereinabove is that the documents found from the premises of third party cannot form the basis of the addition. In the present case, the survey has been carried out on 25.01.2010 in the premises of the assessee prior to the passing of the intimation u/s 143(1) dt.09.03.2010 and thereafter, search and seizure operation was carried out in the premises of the assessee. We find no order u/s 143(3) of the Act was passed by the Assessing Officer and search and seizure operation was carried out in the premises of the assessee and before that a survey action was also initiated. The argument of the assessee that the documents recovered from the premises of Mukesh Sharma cannot be taken into consideration, in our view, is without any basis as the Assessing Officer while passing the order was required to consider the evidences as may be produced by the assessee and after taking into account all the relevant materials which the Assessing Officer has gathered. In the present case, the evidence of making the payment of 9.25% of the contract value was duly confronted by the Assessing Officer to the assessee. After the evidence was confronted to the assessee, the assessee had admitted the amount of Rs.7,13,73,002/- and also admitted the additional amount of Rs.1,48,99,595/-. In fact the ld.CIT(A) in the order has referred to the statement recorded under section 131 of the Act and mentioned as under :-

> *"It is further seen vide para 4.10 of the assessment order that the Executive Director of the assessee company in a response u/s.131*

stated that while executing the project at Indore the claim for expenditure incurred by the Company in works awarded to certain sub-contractors of whom seven were identified, was being withdrawn."

24.3 Thereafter Assessing Officer / ld.CIT(A) had recorded that assessee admitted the disallowance of Rs 7,13,73,002/-. Once the assessee had admitted the disallowance of expenditure made towards sub-contracts, amount based on the material available on record, the Assessing Officer had made the addition of the balance amount of Rs.13,42,84,130/-. The findings of the Assessing Officer given in paragraph 4.25 to 4.27 are apt. We do not find any reason to disagree with the order passed by the Assessing Officer and ld.CIT(A) on this issue. The submission of the assessee that there is no corroborative evidence and the assessee was not given an opportunity to cross-examine Shri Mukhesh Sharma in our opinion is without any basis. No such demand was made at the time of assessment or passing of the order by the appellate authority. The evidence recovered from the premises of Mukhesh Sharma along with subsequent admission of unexplained expenditure / investment and accepted by the assessee during the assessment proceedings, clearly shows that the assessee was not interested in cross-examining the said Mukhesh Sharma. Furthermore, the money given by the assessee was illegal money (gratification) for grant of the contract of Rs.267 crores to various persons (Minister, Commissioner, Urban Secretary, Mayor etc.). In fact, when the evidence of illegal money was found during the course of search and seizure then the necessary consequential proceedings should have also been initiated against the erring persons. In our opinion, the speed money / illegal money / gratification paid by the assessee for getting the contract cannot be permitted and the Revenue

Authorities had rightly made the addition in the hands of the assessee. In view of above reasons and also on account of reasons given by the Assessing Officer / ld.CIT(A), we reject this argument of the assessee.

24.4. The alternative argument of the assessee was that the addition should be restricted to 9.25% of Rs.126 crores (the value of the work which has been executed in A.Ys. 2008-09 to 2010-11). In our view, the above said argument is also required to be rejected. As mentioned hereinabove, 9.25% was paid by the assessee for grant of the contract of Rs.267 crores and the contracts were awarded during the assessment years under consideration and therefore, the disallowance was required to be made for the assessment years under consideration. The argument of the assessee that there was no question of upfront payment made by the assessee after grant of the contract to the persons mentioned in the slip / documents found from the premises of Mukhesh Sharma, is required to be rejected. In fact, during the survey at the premises of the assessee, another sheet was found wherein it was mentioned that the assessee was paying another 7.80% to various authorities. In fact, the said sheet was reproduced by the Assessing Officer in paragraph 4.1.2 of his order. To our surprise, no addition has been made in the hands of the assessee on the basis of the sheet found from the premises of the assessee. In our considered opinion, the argument that the addition should be restricted to the work executed by the assessee @ 9.25% on Rs.127 crores clearly shows the admission of assessee that illegal money was paid by the assessee for getting the contract. Therefore, this contention of the assessee cannot be accepted as the payment of upfront @ 9.25% of Rs.267 crores was different than the payment which was paid after getting the

contracts to various authorities as per the document found from the premises of the assessee (Paragraph 4.12 of the assessment order). Hence, this argument of the assessee is required to be rejected.

24.5. The second alternative argument of the assessee was to claim the set off of the income already declared by the assessee in the assessment year 2010-11 for Rs.11,21,87,364/- and Rs.4,50,55,095/- in A.Y. 2011-12. In our view, the above said contention is also without any basis.

24.6 Firstly, for A.Y. 2010-11, as mentioned hereinabove, the assessee has filed the revised return of income and admitted additional income of Rs.11,21,87,364/-. Once the assessee had admitted the additional income in the revised return of income, then it is not permissible to claim the telescoping / set off of the same income in the assessment year under consideration. The assessee cannot be permitted to get indirectly what he cannot get directly. No set off of income is permissible against the additional income admitted by the assessee in the revised return of income.

24.7 With respect to A.Y. 2011-12, the argument of the assessee is that the additional income admitted by the assessee in the F.Y. 2010-11 for an amount of Rs.4,50,55,095/- is to meet all the eventualities that may arise. The assessee by way of the additional ground as mentioned hereinabove sought to seek the telescoping / setting off of the income of Rs.4,50,55,095/- declared in the assessment year 2011-12 for A.Y. 2008-09. In our considered opinion, the same cannot be permitted for the reason that the assessment was completed for A.Y. 2011-12 and the

assessee is not in appeal before us. The grounds which have attained finality and when the assessee is not in appeal cannot be disturbed for the proceedings for A.Y. 2008-09. In the appeal of the Revenue for A.Y. 2011-12, this relief cannot be granted. The assessee in the additional ground and in alternative submission has sought to the telescoping of Rs.11,21,87,364/- and Rs.4,50,55,095/- (totaling to Rs.15,72,42,459/-) as against the addition of Rs.13,42,84,130/-. This relief cannot be granted as the sum of the amount would be more than the addition made by the Assessing Officer and confirmed by the ld.CIT(A). Accordingly, the ground No.2 and the additional grounds raised by the assessee are dismissed.

GROUND NO.3

24.8 The ground No.3 of the assessee's appeal for A.Y. 2008-09 pertains to the addition of Rs.1,40,000/- on account of unexplained expenditure. The assessee has not pressed the ground, therefore the same is dismissed as not pressed.

24.9 The Revenue filed the appeal vide ITA No.77/Hyd/2017 for the A.Y 2008-09 and raised the following grounds:

> *"1. Whether on the facts and circumstances of the case, the CIT (A) is correct in allowing deduction u/s 80IA for the A.Ys 2008-09 to 2011-12, relying on the decision of jurisdictional ITAT in the assessee's own case for the A.Ys 2001-02 to 2004-05, even as the Hon'ble High Court has already admitted the appeal of the Revenue for the A.Y 2001-02.*
>
> *2. Whether the learned CIT (A) is correct in law in allowing the expenditure of ESOP u/s 37(1) of the I.T. Act, when the expenditure is capital in nature? (for A.Y 2008-09).*
>
> *3. Any other ground that would be taken at the time of hearing".*

25. The Revenue also filed the following additional grounds:

> *"1. Whether in the facts and circumstances of the case, the ld.CIT(A) is correct in accepting and relying on the remand report given by the AO which ignored the specific directions issued at Para-13 in ITA Nos.1023 to 1025/Hyd/2010 dated 28.10.2013 by Hon'ble ITAT for Asst. Years 2005-06 to 2007-08 rendering the remand report as inconclusive ?*
>
> *2. Whether in the facts and circumstances of the case, it is correct on the part of the ld.CIT(A) to grant relief placing reliance on direction of Hon'ble ITAT in order dated 28.10.2013 in ITA Nos.1023 to 1025/Hyd/2010, when the remand report submitted by the AO is in contrary to the directions of the Hon'ble ITAT?*
>
> *3. Whether in the facts and circumstances of the case, the ld.CIT(A) is correct in deciding the case without application of mind of his own, by merely placing reliance on a remand report when the proceedings are that of CIT(A) and remand report is part of appellate proceedings and not original assessment proceedings.*
>
> *4. Whether in the facts and circumstances of the case, the deduction u/s.801A can be granted to projects of the assessee which are in nature of works contracts ?*
>
> *5. The appellant craves leave to amend or alter any grounds or adda new ground, which may be necessary."*

26. First of all, we will deal with the deduction claimed u/s 80IA(4) of the Act. This issue is common for the AY 2008-09, 2009-10, 2010-11 and 2011-12 bearing ITA Nos.77 to 80/Hyd/2017. The learned DR drew our attention to the order passed by Assessing Officer with respect to the ground relating to 80IA. The findings given by the Assessing Officer at page 56 vide para 9 and 9.1 read as under:

9. Deduction claimed u/s 80IA of the I.T Act.

9.1 The claim of the assessee for deduction u/s. 80IA of the Act was considered and for the detailed reasons mentioned in the Asst. Orders for the Asst. Years 2005-06 to 2007-08 vide order u/s. 153A r.w.s. 143(3) dt. 28.03.2013, the claim of the assessee under Section 80IA is disallowed and added to the returned income.

9.2 Penalty proceedings u/s 271(1)(c) of the Act are initiated for furnishing inaccurate particulars of income and concealment of income in this regard.

Addition: Rs. 35,32,06,010/-

27. The learned CIT (A) for the following reasons has allowed the appeal at page No.34 vide para 7.1 to 7.3 as under:

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7.1 The assessee disputed the addition vide Ground No.6 & 7 (in AY 2008-09) to the effect that basic facts of the eligible projects undertaken by the assessee were not appreciated. The objections raised in the written submissions are identical for the other assessment years 2009-10 to 2011-12 also. It was stated that the assessee was in the business of development of roads, bridges, water supply systems, irrigation projects and airports which were eligible for the deduction. Reference was made to the contractual agreement entered into with a government or government agency for constructing an infrastructure facility which provided for building as well as maintenance with its own financial resources, technical expertise, material, and manpower. It was also stated that all associated risks were borne by the assessee, as a result of which it was liable to be seen as a developer in its own right and not as a contractor, to be hit by explanation placed below Section 80IA(13). The orders of the ITAT in its own case from A.Yrs. 2001-02 to 2004-05 dated 27.08.2012, and for A.Yrs. 2005-06 to 2007-08 dated 23.10.2013 to the effect that outright denial of deduction by holding the assessee to be a 'contractor for work' is not correct have been cited. In the cited orders of the ITAT in the assessee's own case, matters had been remanded back to the Assessing Officer for a factual verification of the role and responsibility envisaged for the assessee in the respective contract agreements. These decisions in turn followed the precedent laid down by the jurisdictional Bench of ITAT in *GVPR Engineers Ltd. v. ACIT*, 51 SOT 207 (URO), and orders dated 16.03.2012 in the case of *KMC Constructions Ltd. v. ACIT* (ITA No.996/Hyd/2003) and *Sushee Hi-Tech Constructions Pvt Ltd. v. DCIT* (ITA Nos. 269 & 1165/Hyd/2009). In these decisions the Hon'ble ITAT distinguished between pure works contracts and other contracts which are invested with features characteristic of persons undertaking entrepreneurial investment risk such as employment of own financial resources, technical know-how, and plant and machinery. It is stated by the Ld. A.R. that on these directions the Assessing Officer verified the assessee's claim for the earlier assessment years 2005-06 to 2007-08 and found the assessee eligible for deduction claimed u/s.80IA(4). It is further claimed that a majority of projects thus found eligible in the earlier assessment years were continuing in A.Y.2008-09 also. The assessee company furnished a list

of 55 projects in respect of which deduction was claimed in A.Y.2008-09. A tabulation of features relevant to the risk profile of a developer enumerated in the precedents relied upon was also furnished. It was pointed out that 36 of these projects are brought forward from the earlier assessment year(s) where a finding has since been given by the Assessing Officer - in remand proceedings, that they are eligible with reference to the yardstick employed by the Hon'ble ITAT.

7.2 The details furnished in appeal proceedings have been forwarded to the Assessing Officer and the Range Head vide this office letter dated 22.01.2015 calling for an examination of the project details furnished in the light of the above referred decisions of the Hon'ble ITAT in the assessee's own case. The report of the Assessing Officer dated 03.02.2015 forwarded by the Addl. C.I.T., Central Range-1, Hyderabad on 17.02.2015 records that the Assessing Officer upon verification of agreements found that the like the 36 projects examined in earlier years the 19 projects commenced during the year also satisfied the conditions prescribed by the ITAT in the cited orders. As a result, the claim for deduction u/s.80IA(4) in respect of the 55 projects relevant to A.Y.2008-09 now stands endorsed. Similarly, in AY 2009-10 the Assessing Officer reported that out of the 65 projects in respect of whose profits the deduction was claimed 28 projects continued since assessment years 2007-08 where the conditions were seen to have been satisfied in the remand proceedings directed by the ITAT. In respect of 13 projects there is an overlap with A.Y.2008-09 where verification showed that the contract agreements fulfilled the criteria setup by the Hon'ble ITAT referred to above. The balance 24 projects which commenced during the year were also seen to fulfil these conditions. It is reported by the Assessing Officer that there are no new projects that commence in the financial year relevant to A.Y.2010-11 & 2011-12. For identical reasons, therefore, it is reported that the 51 projects in A.Y.2010-11 and 47 projects in A.Y.2011-12 in respect of whose profits deduction u/s.80IA was claimed in the respective years, could be seen as projects where assessee was a *developer* as opposed to a *contractor*, having regard to the criteria laid down by the Hon'ble ITAT.

7.3 This finding of fact by the Assessing Officer, seen in the context of the decision of the jurisdictional Bench of the Hon'ble ITAT - that currently holds the field, would mean that the deduction claimed u/s.80IA(4) by the assessee company has to be allowed. The Assessing Officer is directed accordingly. Ground No.6 & 7 in A.Y.2008-09, Ground No.5-7 in A.Y.2009-10, Ground No. 5-7 in A.Y.2010-11 & Ground No.2-5 in A.Y.2011-12 are, therefore, allowed.

28. Aggrieved with the order of the learned CIT (A), the Revenue is in appeal before the Tribunal.

29. At the outset it was submitted that the reason for filing the appeal was that for the earlier year, relief has been granted by the Tribunal and based on that the ld.CIT(A) has also granted relief and thereafter, Assessing Officer passed the order giving effect in favour of the assessee. It was submitted that the Revenue is in appeal before the Hon'ble High Court and the present appeal was filed only with a view to keep the issue alive. The learned DR also submitted that the Revenue had also filed the additional ground as reproduced above. The Ld.DR had also filed the written submissions in support of the case of the Revenue. The written submissions of the Revenue for disallowing the claim of the assessee u/s 80IA is as under:

> *"7.1 Assessee claimed deduction u/s 80IA(4) of the Act for the works executed during the year. The AO disallowed the same relying on the arguments made in the assessment orders for the AYs.2005-06 to 2007-08, Ld. CIT(A) deleted the addition relying on the decisions of the Hon'ble ITAT for earlier years.*
>
> *7.2 Department has not accepted the decision of the Hon'ble Tribunal and filed appeal before the Hon'ble High Court of Telangana and the appeals have been admitted. In support of the argument that the assessee is not eligible for deduction u/s 801A(4) of the Act, reliance is placed on the decision of the Hon'ble ITAT Hyderabad in the case of NEC-NCC-Maytas JV ITA No.496/H/2018 dated 12.05.2021."*

30. Per contra, the learned AR submitted that the learned CIT(A) had passed the order after seeking a remand report from the Assessing Officer in respect of all the A.Ys. It was also submitted that during the present proceedings, the Assessing Officer had filed the report which is to the following effect :

(2)

Office of the
Deputy Commissioner of Income Tax,
Central Circle-1(1), Hyderabad.
Dated: 03.02.2015

PAN:

To,

The Commissioner of Income Tax (Appeals) - XI
Hyderabad.

//Through Proper Channel//

Madam,

Sub: Appeal in the case of M/s NCC Ltd - A.Y 2008-09 to 2011-12 - submission of remand report - Reg.
Ref: CIT(A)-XI, Hyd letter in FNo.CIT(A)-XI/Remand report/14-15 dated 22.01.2015.

* * * * *

Kind reference is invited to the above mentioned subject.

In this connection, as directed, the details of projects forwarded were examined in the light of the decision of the Hon'ble ITAT in appellant's own case for the A.Y 2005-06 to 2007-08 and after due verification, the remand report is submitted as under:

A.Y 2008-09: For the year under consideration, the assessee company had claimed deduction u/s 80IA in respect of profits from 55 projects. The assessee submitted chart giving details of the 55 projects specifying whether the conditions as laid down in the order of the Hon'ble ITAT as referred above were fulfilled. It was found that, out of the total 55 projects, 36 projects continued since the immediately preceding assessment year 2007-08 where deduction u/s 80IA in respect of the same was examined and allowed as stated in the order consequential to the Hon'ble ITAT order. This was found to be in order. The balance 19 projects commenced during the year and were verified with agreements in respect of the same. As a result, it was found that the conditions as laid down by the Hon'ble ITAT in its order and as per the provisions of section 80IA of the IT Act, 1961, were fulfilled in respect of these 19 projects too. Copy of the chart submitted by the assessee showing the 55 projects, duly verified is enclosed.

A.Y 2009-10: For the year under consideration, the assessee company had claimed deduction u/s 80IA in respect of profits from 65 projects. The assessee submitted chart giving details of the 65 projects specifying whether the conditions as laid down in the order of the Hon'ble ITAT as referred above were fulfilled. It was found that, out of the total 65 projects, 28 projects continued since the assessment year 2007-08 where deduction u/s 80IA in respect of the same was examined and allowed as stated in the order consequential to the Hon'ble ITAT order. Further, 13 projects overlapped since A.Y 2008-09 where the agreements were already verified and found to be in order. The balance 24 projects commenced during the year and were verified with agreements in respect of the same. As a result, it was found that the conditions as laid down by the Hon'ble ITAT in its order and as per the provisions of section 80IA of the IT Act, 1961, were fulfilled in respect of these 24 projects too. Copy of the chart submitted by the assessee showing the 55 projects, duly verified is enclosed.

(3)

A.Y 2010-11: For the year under consideration, the assessee company had claimed deduction u/s 80IA in respect of profits from 51 projects. The assessee submitted chart giving details of the 51 projects specifying whether the conditions as laid down in the order of the Hon'ble ITAT as referred above were fulfilled. It was found that, out of the total 51 projects, 20 projects continued since the assessment year 2007-08 where deduction u/s 80IA in respect of the same was examined and allowed as stated in the order consequential to the Hon'ble ITAT order. Further, 11 projects overlapped since A.Y 2008-09 and 20 projects overlapped since A.Y 2009-10 where the agreements were already verified and found to be in order. No new projects commenced during the year. Copy of the chart submitted by the assessee showing the 51 projects, duly verified is enclosed.

A.Y 2011-12: For the year under consideration, the assessee company had claimed deduction u/s 80IA in respect of profits from 47 projects. The assessee submitted chart giving details of the 47 projects specifying whether the conditions as laid down in the order of the Hon'ble ITAT as referred above were fulfilled. It was found that, out of the total 47 projects, 17 projects continued since the assessment year 2007-08 where deduction u/s 80IA in respect of the same was examined and allowed as stated in the order consequential to the Hon'ble ITAT order. Further, 10 projects overlapped since A.Y 2008-09 and 20 projects overlapped since A.Y 2009-10 where the agreements were already verified and found to be in order. No new projects commenced during the year. Copy of the chart submitted by the assessee showing the 51 projects, duly verified is enclosed.

Submitted to the Commissioner of Income Tax(Appeals)-XI, Hyderabad.

Yours faithfully,

(RAJESH NATARAJAN)
Deputy Commissioner of Income Tax,
Central Circle-1(1), Hyderabad.

Encl: As above.

31. It was submitted that since the issue has attained finality upto the level of the Tribunal for A.Y.s 2005-06 to 2007-08 and the relief was granted to the assessee after examining the case of the assessee for entitlement of section 80IA, therefore, there is no reason to interfere with the order passed by the learned CIT (A). It was further submitted that the additional grounds filed by the Revenue do not emanate from the order passed by the learned CIT (A). It was submitted that the Revenue should not be aggrieved by the order passed by the CIT (A). Once the order was passed by the learned CIT (A) based on the remand report submitted by the Assessing Officer, then it is not

permissible in law to file the appeal challenging the same remand report filed by the Assessing Officer. In this context, the learned AR relied on the following decisions:

1.	Judgment of the Hon'ble Bombay High Court in the case of Jivatlal Purtapshi v. CIT (65 ITR 261)
2.	Relevant pages from the order of Pune Bench of the Hon'ble Tribunal in the case of Dr. D.Y. Patil Pratisthan v. DCIT for A.Y. 2006-07 in ITA No. 1592 and 1612/PN/11 dated 14.12.2012
3.	Judgment of the Hon'ble Madras High Court in the case of Ramanlal Kamdar v. CIT (108 ITR 73)
4.	Judgment of the Hon'ble Punjab and Haryana High Court in the case of Banta Singh Kartar Singh v. CIT (125 ITR 239)
5.	Order of Hyderabad Bench of the Hon'ble Tribunal in the case of ITO v. Shri Ramanalal Gudivada for A.Y. 2016-17 in ITA No. 178/Hyd/2020 dated 06.10.2021
6.	Order of Hyderabad Bench of the Hon'ble Tribunal in the case DCIT v. Tracks & Towers Infratech P. Ltd. for A.Ys. 2015-16 and 2016-17 in ITA Nos. 1514 and 1515/Hyd/2019 dated 26.05.2023
7.	Judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT (229 ITR 383)

32. The learned AR had further submitted that the additional grounds raised by the Revenue in the present appeal are not sustainable in view of the fact that the Revenue is not aggrieved by the order passed by the learned CIT (A) and the learned CIT (A) had passed the order after considering the remand report, the Assessing Officer. It was his submission that in the remand report, the Assessing Officer has confirmed that the assessee was entitled to claim u/s 80IA of the Act. To buttress his argument, the learned AR relied upon the above-mentioned decisions.

33. The learned AR drew our attention to para 16 and 17 of the order passed by the Tribunal in the case of Dy. CIT vs. Tracks & Towers Infratech P Ltd for the A.Ys 2015-16 and 2016-17 in ITA No.1514 and 1515/Hyd/2019 dated 26.05.2023.

34. The learned AR further submitted that the Revenue is bound to follow the principle of consistency. It was submitted that the fact of the previous A.Y are identical to the subsequent AYs. It was also contended that the projects for which the Department had granted 80IA (4), are continuing in the subsequent assessment years and therefore, the principle of consistency is required to be followed. The LD.AR had relied upon the following decisions:

1. CIT vs. Excel Industries (358 ITR 295)
2. Radhaswamy Sansangh vs. CIT 193 ITR 321
3. PCIT vs. Gujarat Narmada Valley 422 ITR 164
4. Prasad Multi Services Pvt Ltd vs. DCIT 423 ITR 542
5. CIT vs. Escorts Ltd 338 ITR 485

35. In rebuttal, the learned DR submitted that the Tribunal in the case of NCC Mytas for the A.Y 2006-07 after elaborate examination of the facts had decided the issue against the assessee and our attention was drawn to Paras 9 to 17 of the said decision which is to the following effect:

> *"9.1 The assessee's first and foremost plea that we ought to adopt liberal interpretation while considering section 80IA(4) claim in the light of relevant facts in the instant case deserves to reject. Suffice to say, such a course of liberal interpretation is no more available while dealing with the Income Tax Act's provisions as per honourable apex court's recent constitutional bench's decision in Commissioner of Customs (Import) Vs. Dilip Kumar and Co. (2018) 9 SCC 1 settling the law that a fiscal statute as well as an exemption clause incorporated therein ought to be construed in stricter parlance only. Their lordships make it clear that benefit of doubt in case of taxing provision goes to the tax payer and vice versa in an instance of an exemption provision. The assessee's first argument is rejected therefore.*

10. We next examine the merits of the assessee's claim in light of section 80IA(4) r.w. Explanation (c) thereof. This is for the reason that the legislature has reintroduced the Explanation; formerly inserted by the Finance Act, 2007 w.e.f. 1.4.2007 that "For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise as the case may be," followed by its substitution by the Finance Act, 2009 w.e.f. 1.4.2000 that "for the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub- section (4) which is in the nature of a works contract awarded by any person (including the central or state government) and executed by the undertaking or enterprise referred in sub-section (1)."

11. Learned CIT-DR at this stage quoted Katira Constructions Limited Vs. Union of India and Others (2013) 352 ITR 513 (Guj) upholding vires of the latter explanation that the same is purely explanatory in nature than amending the existing provision and therefore, the question of it being levying any tax with retrospective effect would not rise. It is thus explicitly clear that their lordships have held this latter explanation in the nature of a plain and simple one; neither adding nor subtracting anything to the earlier explanation, inserted vide Finance Acts, 2009 and 2007; respectively.

Learned CIT-DR further sought to pin point the fact that the latter explanation inserted vide Finance Act, 2009 w.e.f. 1.4.2000 has rather covered a work contract as not entitled for the impugned deduction despite the fact that the concerned assessee satisfied all other conditions in sub-section (4) of section 80IA of the Act. We find force in Revenue's instant argument as the Finance Act, 2009 substitutes the earlier explanation that the same would not cover a works contract for the purpose of providing deduction qua industrial undertaking or enterprise engaged in infrastructure development, etc.

12. There is yet another equally important aspect which requires our apt adjudication at this stage i.e. of the clinching legislative expression in the latter explanation "nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the central or the state government)". We note that honourable apex court yet another larger bench decision in Kartar Singh Bhadana Vs. Hari Singh Nalwa & Ors Civil Appeal No.6931 of 2000 decided on 27.03.2001 had an occasion to deal with the expression "works" used in section 9-A of the Representation of People Act, 1951. Hon'ble court therein went by the shorter Oxford English Dictionary's meaning that "work means a structure or apparatus of some kind; an architectural or engineering structure, a building edifice. When it was used in the plural, that is, as works, it meant architectural or engineering operations, a fortified building, a defensive structure, fortification or any of the several parts of such structures". Their lordships also

took note of honourable jurisdictional high court's judgment in B. Laxmikantha Rao Vs. D Chinna Mallaiah AIR 1979 AP 132 whilst adopting the dictionary meaning of "work" in foregoing terms. We further quote Raghunath Rai Baraza Vs. PNB (2007) 135 Company cases 163 (SC) that it is the cardinal rule of interpretation that words used by the legislature are to be understood in their natural, ordinary or popular sense or constructed as per their grammatical meaning unless such a construction lead to some absurdity or there is something in the context or in the object of the statute to the contrary.

13. We go by the foregoing observations of their lordships and observe that the stages I & II of the Bhima Lift Irrigation project undertaken by the assessee containing " all the civil works like canal approach to the tunnel, tunnel, surge pool pump house, delivery mains manufacturing, testing, inspection, packing, supply, erection and commissioning of electro mechanical and hydro mechanical equipment" indeed formed an architectural as well as engineering structure and therefore, amounts to an execution of a "works contract awarded by the state government" through its irrigation development only and covered u/s. 80IA Explanation incorporated in the Act by the Finance Act, 2009 w.e.f. 1.4.2000.

Learned CIT-DR at this stage invited our attention to page 18 in assessee's Paper Book II Part 1 that it had purely executed "works contract" only in view of the fact that the irrigation department had issued it mobilization advances on multiple occasions from time to time. He next took us to agreement clause 3.15 containing "contract price and payment" making it evident that the assessee had to be paid on "fixed lump sum monthly basis" only. And further that the assessee was entitled to get "fixed lump sum monthly instalment payments provided value of the work executed is more than or equal to the fixed lump sum monthly instalment as indicated in the agreement." The said agreement stipulated advance payments to the assessee qua supply of goods at the site. All these facts sufficiently indicate that the assessee, assuming that not accepting that it is the developer u/s. 80IA(4) of the Act, executed a works contract only under Explanation to section 80IA of the Act and therefore, not entitled for the impugned deduction.

14. The assessee next made a very strong endeavor to place reliance on a catena of case law (supra) including CIT Vs. ABG Heavy Industries Limited (2010) 322ITR 323 (Bom). We find that neither of these decisions deals with the interplay between the section 80IA(4) Vs. 80IA Explanation involving execution of works contract as is the factual position before us. The said case law distinguished, therefore.

15. Mr. Afzal's last argument seeks to buttress the point that such a strict interpretation employed in dealing with an instance of development of an infrastructure project would tantamount to closing the deduction chapter altogether and more particularly,

when this assessee has borne all risks and responsibilities of the lift irrigation project by paying reduction money and performance guarantee(s) as well. We hold that this last argument also fails to cut any ice since the assessee has merely performed a works contract and its retention money or the so called performance guarantee only gave an assurance to the irrigation development that it had carried out the corresponding construction etc. as per the specified design norms than involving any business risk. We accordingly hold the view of our independent appreciation of facts as well as assessment findings that the assessee is a contractor having executed works contract only.

16. We also deem it appropriate to quote Adam Smith's 'The Wealth of Nations' (published in 1776 and called as the founding work on modern economics) that " It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."

17. Nevertheless, the same connotation applies in the facts of the instant case. It is clear that the assesseehas first of all been paid mobilization advances by the state government's department on periodic basis, and, then only it executed the corresponding lift irrigation project works contract followed by its yet another claim of section 80IA of the Act deduction (supra). We are afraid that such a liberal interpretation would amount to going against the stricter interpretation principle in view of honourable apex court decision (supra). We accordingly conclude both the learned lower authorities have rightly disallowed assessee's 80IA deduction claim involving varying sum(s) (supra) in their respective orders. The same stands confirmed. These assessee's appeals are dismissed therefore."

36. We have heard the rival arguments made by both the sides and perused the available material on record. Undoubtedly, the Tribunal in ITA 141/Hyd/2007 for the A.Y 2001-02 to 2003-06 and 2006-07 to 2007-08 had granted relief to the assessee. The above said proposition has not been disputed by the learned DR for the Revenue. It was the case of the revenue that the Department had filed the present appeal against the impugned order for keeping the issue alive, as the revenue is already before the Hon'ble High Court against the order passed by the Tribunal for the A.Y 2001-02 to 2007-08. In our view, mere admission of the appeal of the Revenue by the Hon'ble High Court will not automatically lead to the stay of the order passed by the Tribunal.

No order was passed by the Hon'ble High Court staying the order of the Tribunal passed in the appeals of the assessee for the A.Y 2001-02 to 2007-08. Therefore, in the absence of any stay of the order passed by the Tribunal, the rule of consistency requires this Tribunal to follow the decision of the co-ordinate Bench of the Tribunal rendered in the similar facts. In fact, the Hon'ble Supreme Court in the case of Honda Siel Power Products Limited Vs. CIT reported in [2007] 165 Taxman 307 (SC) held as under :

> *"13. "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the Court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the co-ordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material, which was already on record. The Tribunal has acknowledged its mistake; it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case.*

36.1 Similarly, the jurisdictional High Court in the case of Mylan Laboratories Ltd reported in [2022] 137 taxmann.com 178 (Telangana) had held as under:

> *"34. We are afraid such a view taken by the Assessing Officer can be justified. Rather, it is highly objectionable for an Assessing Officer to say that decision of the Income Tax Appellate Tribunal is not acceptable; and that since it has been appealed against, the issue of allowability of depreciation on goodwill has not attained finality. Unless there is a stay, order/decision of the jurisdictional Income Tax Appellate Tribunal is binding on all income tax authorities within its jurisdiction.*

35. In Union of India v. Kamlakshi Finance Corporation Ltd. 1992 taxmann.com 16, Supreme Court held and reiterated that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department, which in itself is an objectionable phrase, and is the subject matter of an appeal can be no ground for not following the appellate order unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to the assessee and chaos in administration of the tax laws.

36. Following the above decision, Supreme Court again in Collector of Customs v. Krishna Sales (P.) Ltd. 1994 Supp. (3) SCC 73, reiterated the proposition that mere filing of an appeal does not operate as a stay or suspension of the order appealed against. It was pointed out that if the authorities were of the opinion that the goods ought not to be released pending the appeal, the straight-forward course for them is to obtain an order of stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal.

37. Following the above decisions of the Supreme Court, a Division Bench of the Bombay High Court in Ganesh Benzoplast Ltd. v. Union of India 2020 (374) ELT 552 held that non-compliance of orders of the appellate authority by the subordinate original authority is disturbing to say the least as it strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appellate remedy provided to a litigant under the statute. Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

38. This principle has been reiterated by the Bombay High Court in Himgiri Buildcon & Industries Ltd. v. Union of India 2021 (376) ELT 257.

39. Therefore, the stand taken by the Assessing Officer that since the decision of the Income Tax Appellate Tribunal in the case of the petitioner itself for the assessment year 2014-15 has been appealed against the issue in question has not attained finality, is not only wrong but is required to be deprecated in strong terms being highly objectionable."

37. In view of the above, the rule of consistency is required to be maintained in the conduct of the Revenue. Further there is no change in the facts for the A.Ys under consideration. In fact, the learned CIT (A) before granting relief to the assessee had

called for the remand report from the Assessing Officer which is reproduced above and the Assessing Officer in the remand report had confirmed that the assessee is fulfilling the conditions as laid down for the purpose of getting deduction under the provisions of section 80IA in terms of the decision of the Tribunal passed in earlier A.Ys. In fact, once the Assessing Officer had given the report saying that the assessee had fulfilled the conditions as stipulated by the Tribunal for the purpose of enabling it to claim deduction u/s 80IA, therefore, we do not find any error in the order passed by the learned CIT(A) granting deduction u/s 80IA(4) of the Act.

38. The learned AR had also drew our attention to the order passed by the Assessing Officer, giving effect to the directions issued by the Tribunal for the A.Ys 2001-02 to 2007-08, whereby the Assessing Officer was directed to examine each of the contract work and verify whether the contract involves development, operation and maintenance, financial involvement and defect correction liability period and to say whether the income arising from such contract is eligible for deduction u/s 80IA(4) of the I.T. Act. The Assessing Officer after examining the agreements of the assessee, had granted the relief to the assessee. We, therefore, do not find any reason to take any contrary view and therefore, agree with the view taken by the ld.CIT(A) on this issue.

38.1 The contention of the ld.DR is that the Tribunal in the case of NEC-NCC (supra), had decided the issue against the said assessee and therefore, the said decision is required to be followed by this Tribunal in the present case. In our view, the above said contention of the ld.DR is required to be rejected outright for the reasons mentioned hereinabove as the issue has been decided in

the case of the assessee by the Tribunal and against the said decision, the Revenue is in appeal before the Hon'ble High Court. Once an issue has been decided by the Tribunal in assessee's own case for the earlier years, and the facts remain the same, then in that case, the order of the Tribunal in assessee's own case has to be followed as against the decision of Tribunal in the case of some other assessees wherein the facts were totally different. After passing of the order by the Tribunal in case of the assessee, there is no decision of the jurisdictional High Court or of the Hon'ble Supreme Court against the assessee, whereas there are number of decisions in favour of the assessee on this issue by various High Courts and different Benches of the Tribunal.

38.2 Secondly, the ld.CIT(A) while granting the relief to the assessee had called for the remand report from the Assessing Officer and based on the remand report only, the ld.CIT(A) has granted the relief to the assessee. Moreover, the sole reason for passing the order by the Assessing Officer was the detailed reasons mentioned in assessment order for the A.Ys. 2005-06 to 2007-08.....". As mentioned herein above, the Tribunal vide order dt.23.10.2013 had granted relief to assessee, hence, the reason given by Assessing Officer for A.Ys. 2005-06 to 2007-08 were no more available to the Assessing Officer/ Revenue.

38.3 Thirdly, the Tribunal while passing the decision in the case of NEC-NCC (supra) has not considered the decision of the co-ordinate Bench of the Tribunal in the case of the assessee rendered in ITA No.141/Hyd/2007 dt.27.08.2012 and ITA No.1023/Hyd/2010 dt.23.10.2013. Therefore, the decision of the Tribunal in the case of NEC-NCC (supra) cannot be said to be binding on this Tribunal more particularly when the case of the

assessee, the co-ordinate Bench of the Tribunal had already granted relief to the assessee. No change of facts or law has been brought to our notice by the ld.DR which command us to follow the subsequent decision passed by the Tribunal in the case of NEC-NCC (supra). In the light of the above, the ground and additional ground raised by the Revenue are dismissed.

38.4 The next ground raised by the Revenue is the expenditure allowed by the learned CIT (A) after ESOP u/s 37 of the I.T. Act. For the above said purposes, the learned DR drew our attention to Para 10 at page 56 of the assessment order which is to the following effect:

10. Expenditure claimed on E.S.O.P:

During the year, the assessee-company claimed an amount of Rs.1,12,97,840/- as expenditure towards allotment of shares under E.S.O.P. Since the expenditure claimed is only notional, it is not allowable as an expenditure.

The allotment of shares to its employees at a concessional rate does not result in any expenditure to the company. Therefore, even the question of considering it as a revenue or capital expenditure does not arise. The expenditure claimed by the assessee is contingent and notional in nature. The SEBI Guidelines issued on the subject does not state that the Employee Compensation expenses are to be debited to Profit and Loss Account. By allotting the shares to its employees at a concessional rate, the company is in a way forfeiting the part of share premium, the receipt of which is of capital in nature. The notional loss whatsoever, if at all, to be considered as incurred is to

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be written off against the share premium account only and as such the expenditure claimed is not allowable as revenue expenditure. The claim made of Rs. 1,12,97,840/- is disallowed and added back.

For a similar addition made for the Asst. Year 2007-08, the assessee filed an appeal before the CIT(A). The CIT(A) vide his order in ITA No. 146/DC-16(1)/CIT(A)-V/2009-10 dt. 01.07.2010 dismissed the appeal on this ground as the assessee had not argued the same during the course of appeal proceedings.

(**Addition:** Rs. 1,12,97,840/-)

Penalty proceedings u/s. 271(1)(c) of the I.T. Act in respect of difference between the original income and the assessed income are initiated separately in respect of all the additions.

With the above remarks the income is computed as under –

Income admitted	Rs.1,23,63,87,980
Add: Unexplained expenditure disallowed as discussed above in Para 3	Rs.35,500
Add: Income admitted by the assessee as inadmissible as per para 4.10	Rs.7,13,73,002
Inadmissible expenditure as discussed above in Para 4.27	Rs.13,42,84,130
Add: Unexplained expenditure disallowed as per para 5	Rs.14,76,180
Add: Unexplained expenditure/ inadmissible expenditure at Kochi disallowed and added back as per para 6 above.	Rs.1,61,58,654
Add: Disallowance of unaccounted payments, Ranchi as per para 10 above	Rs.35,00,000
Add: Disallowance of inadmissible expenditure	Rs.1,40,000
Add: Deduction U/s 80IA disallowed as discussed above	Rs.35,32,06,010
Add: Expenditure claimed on E.S.O.P. is disallowed as discussed above	Rs.1,12,97,840
Total assessed Income	**Rs.1,82,78,59,296**

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The tax is computed as under –

Tax thereon @30%	Rs.54,83,57,790
Add: Surcharge @10%	Rs.5,48,35,780
Add: Education Cess @3%	Rs. 1,80,95,810
Less: TDS	Rs.50,18,21,295
Balance Payable	Rs. 11,94,68,085
Add: Interest u/s 234B	Rs.7,16,80,851
Add: Refund already issued	Rs.9,23,45,520
Add: Interest u/s 234D	Rs. 95,33,347
Balance Payable	**Rs.29,30,27,803**

Demand notice, challan and penalty notice u/s 271(1)(c) are issued hereby.

(K SIVA BHAGYA RAO,IRS)
Dy Commissioner of Income Tax,
Central Circle -1, Hyderabad.

Copy to assessee

Dy. Commissioner of Income Tax ★ Central Circle-1, Hyderabad.

DCIT, CC-1, Hyderabad.

39. It was submitted that the assessee feeling aggrieved by the order had filed an appeal before the learned CIT (A) who allowed the grounds raised by the assessee and finding of the learned CIT (A) is given in Para 8 to 8.2 at page 37 and 38 of the impugned order as under:

8. The assessee claimed Rs.1,12,97,840/- as expenditure on account of shares allotted under an Employee Stock Option Plan that was stated to have been approved by the Stock Exchange Board of India. The Assessing Officer held that the expenditure is not only notional in nature but also in the capital field. Even if the future loss of share premium can be seen as an expenditure it is in the nature of a contingent liability that cannot be charge on Revenue account. He also noted that a similar addition was made for A.Y.2007-08 which was upheld by the CIT(A).

8.1 The assessee company challenged this addition vide Ground No.8 stating that the claim for expenditure is based on the certainty of incurring the liability on account of the offer to its employees and this aspect was not considered by the Assessing Officer. In the written submissions the Ld. A.R. placed reliance on para 62 of the ITAT's order in its own case, dated 23.10.2013 in ITA No.1025/Hyd/2010 for A.Y.2007-08, where the claim was allowed with a direction to the Assessing Officer to examine the claim in the light of the Special Bench decision of the ITAT, Bangalore in the case of *Biocon Ltd. v. Dy. CIT*.

8.2 The Special Bench decision above referred (**144 ITD 021**) held that the difference between market price and issue price of shares, in a SEBI approved ESOP scheme is in the nature of a discount that is definitively incurred even though it may not always be precisely quantified. It is, therefore, an ascertained liability and not a contingent liability. It is also an integral part of the employee compensation package and cannot be seen as loss of a future capital receipt. It is, therefore, a deductible expenditure u/s. 37(1) to be allowed based on the period and percentage of vesting under such approved ESOP scheme. It is a chargeable expenditure that should be proportionately spread across the *period of vesting* stipulated in the scheme and calculated with reference to market price of shares at the time of *grant of options* to the employees. It is further provided that the amount of discount so arrived at to be claimed as a deduction, should be subjected to adjustments wherever necessary for the actual difference in the amount of discount with reference to market price at the time of *grant* of the option and market price at the time of *exercise* of the option. Following the directions of the jurisdictional Bench of ITAT - which in turn followed the Special Bench decision, the Assessing Officer is directed to allow the claim subject to verification of the arithmetic correctness of the amount claimed which should be in line with the Special Bench decision. Ground No. 8 is, therefore, deemed to be **allowed.**

40. The learned DR relied upon the order of the Assessing Officer in this regard that the ESOP is not required to be allowed.

41. Per contra, the learned AR drew our attention to the order passed in the case of the assessee for the A.Y 2007-08 and also the decision of the Hon'ble Karnataka High Court in the case of Biocon Limited whereby identical issue has been considered by the Hon'ble Karnataka High Court and thereafter the issue had been decided by the Court in favour of the assessee.

42. We have heard the rival contentions of both the parties and perused the material available on record. The Hon'ble Karnataka High Court in the case of CIT Vs. Biocon Limited reported in [2020] 121 taxmann.com 351 (Karnataka) has held as under :

> *"6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under section 37 of the Act. Before proceeding further, it is apposite to take note of section 37(1) of the Act, which reads as under:*
>
> *Section 37(1) says that any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".*
>
> *7. Thus, from perusal of section 37(1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of section 37(1) of the Act would be attracted. It is also pertinent to*

note that section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange

Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of Infosys Technologies Ltd.(supra) is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under section 201 of the Act for non-deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Years in question was 1997-98 to 1999-2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 1-4-2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in A. Gajapathy Naidu,Morvi Industries Ltd. and Keshav Mills Ltd.(supra) support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account. We are in respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd.'case (supra).

13. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in Radhasoami Satsang v. CIT, [1992] 60 Taxman 248/193 ITR 321, the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question.
In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed."

42.1. Since the issue in the present case is covered against the Revenue by the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Biocon Ltd (supra), therefore, the ground No.3 raised by the Revenue is dismissed.

42.2. Now we deal with ground No.1 which pertains to deduction u/s 80IA(4) of the Act of Revenue's appeals for AY 2009-10, 2010-11 and 2011-12 bearing ITA Nos.78, 79 and 80/Hyd/2017.

43. We have already decided the ground pertaining to deduction u/s 80IA(4) of the Act while deciding the Revenue's appeal in ITA No.77/Hyd/2017 for A.Y. 2008-09. Therefore, our decision pertaining to the deduction u/s 80IA(4) in assessment year 2008-09 shall apply mutatis-mutandis in these appeals too. Accordingly, ground no.1 of Revenue for ITA Nos.78, 79 and 80/Hyd/2017 is dismissed.

44. Now we deal with ground nos.2 and 3 of Assessee's appeal in ITA No.74/Hyd/2017 for A.Y. 2009-10

GROUND NOS.2 AND 3

45. The Assessing Officer has discussed this issue on page no.39 to 49 of his order. Based on a seized paper (copy enclosed) concerning one of the subcontractors of the assessee, the Assessing officer has come to the conclusion that the assessee has incurred certain expenditure which is not allowable.

46. The ld.AR for the assessee had submitted that the addition made by the Assessing Officer is unsustainable for the following reasons :

a) The contract given to M/s Bharat Engineering was on back-to-back basis, wherein the assessee was to earn fixed margin and had nothing to do with the actual expenditure incurred by M/s Bharat Engineering.

b) Normally, in the case of back-to-back contract, the assessee is not Concerned with expenditure incurred by the sub-contractor because payments are always released only after receipt of money from the client. However, in the present case, the contract was prematurely terminated and, hence, the payment was to be released to the contractor upon termination. Therefore, the assessee had undertaken the exercise of examining the expenditure incurred by the subcontractor.

c) Since the contract was awarded to a new contractor, the amount was deducted while making final payment.

d) M/s Bharat Engineering has responded to the summons issued by the Assessing Officer and has submitted the profit and loss account other details (copy enclosed). On perusal of the profit and loss account, it can be seen that they have not claimed any such inadmissible expenditure in their P & L A/c. M/s Bharat Engineering has claimed expenditure of Rs. 1.53 cr. as per seized material. However, admittedly, they have incurred expenditure of Rs. 1.03 cr. only. This itself establishes that the claim was inflated.

e) In any case, the assessee has not reimbursed any expenditure. Rather, the assessee has made payment on principal to principal basis. M/s Bharat Engineering, who has incurred its own expenditure on

a principal basis is responsible for its own expenditure and if any inadmissible expenditure is found recorded in their books, they would be subjected to addition in their assessment.

f) It is unthinkable that out of gross receipt of Rs. 1.48 cr., M/s Bharat Engineering would incur business promotion expenses of Rs. 50.35 lacs.

g) As per seized paper the payment has been made in cash. However, it is not the case of Department that assessee has paid any cash.

h). There is nothing on record to suggest that M/s Bharat Engineering has made payment on behalf of the assessee. Even in direct inquiry, M/s Bharat Engineering has not stated that they have incurred expenditure on behalf of the assessee.

i) In any case, there is nothing on record to suggest that the expenditure, even if it is incurred, was illegal.

j) The Department has made an enquiry with Bharat Engineering and the evidence brought on record pursuant to such enquiry are unequivocally in favour of the assessee.

k) There is no corroborative evidence to support the allegation of the A.O.

47. The ld.AR submitted that without prejudice to the above and strictly in the alternate, it is submitted that the telescoping benefit should be granted as prayed for in respect of ground no. 2 of the assessee's appeal for A.Y. 2008-09.

48. Per contra, ld.DR relied upon the order passed by the Assessing Officer and the ld.CIT(A).

49. We have heard the rival submissions and perused the material on record. The Assessing Officer in Para 7.7 of his order has mentioned that the inquiries were made from BECCPL about the amount of Rs.50,35,000/- and thereafter, had recorded that the expenditure which was unexplained expenditure were forming part of the settlement amount paid by the assessee to BECCPL. The copy of the statement recorded u/s 131 was also provided to the assessee. The assessee had given the reply and the Assessing Officer after considering the reply had made the disallowance of Rs.1,48,03,480/-. On appeal, the ld.CIT(A) had restricted it to an amount of Rs.50,35,000/-. The ld.AR had submitted that the contract was given to BECCPL on back-to-back basis since the contract was terminated in between and thereafter, it was assigned to another company, and therefore, as a full and final settlement, an amount of Rs.1.48 crores was given to the said BECCPL. In fact, the loose sheets found during the course of search from the premises of assessee clearly show that cash amount of Rs.50,35,000/- was paid by the assessee for promotion to BECCPL. Though the assessee had challenged the addition sustained by the ld.CIT(A), however, the assessee has not brought on record any evidence except the ledger sheet filed

before us showing that the amount of Rs.50,35,000/- was not forming part of the expenditure incurred by the said BECCPL. Faced with the above situation, when a document is seized from the premises of assessee, it has the evidentiary value u/s 292C of the Act and the document filed by the assessee namely, the trading account of BECCPL was to rebut the presumption. The statement of BECCPL was recorded by the Assessing Officer and the assessee has given a reply. From the perusal of the impounded documents at page 40 of the assessment order, it is clear that the expenditure claimed by BECCPL was Rs.1,51,81,235/- and Rs.10 lakhs towards transportation (Bangalore to Chennai) totaling to Rs.1,61,81,235/-. As against the claim of Rs.1,61,81,235/-, the assessee had settled the account of BECCPL for Rs.1.42 crores. It is a case of the assessee that the amount of Rs.50,35,000/- was a bogus amount and was included by BECCPL to have an enhanced settlement. In our view, if this argument is accepted then the assessee should have paid Rs.1.12 crores (Rs.1,61,21,235/- - Rs.50,35,000/-) instead of paying the amount of Rs.1.42 crores. As the assessee has paid Rs.1.42 crores as against Rs.1.12 crores, then it can be inferred that the assessee had paid Rs.30 lakhs towards the promotion charges which was incurred by the BECCPL in cash. In our view, on account of the above, the claim of revenue to the extent of 30 lakhs was in accordance with law and thus, the assessee gets relief of Rs.20,35,000/-. Accordingly, ground nos.2 and 3 of the assessee are partly allowed.

50. Now we deal with ground no.2 of assessee's appeal in ITA no.75/Hyd/2017.

50.1 With respect to ground No.2, the ld.AR for the assessee has submitted that the Assessing Officer has held that the assessee has reimbursed certain inadmissible expenditure to the sub-contractor, M/s. M. K. Constructions. It is submitted that the inference drawn by the Assessing Officer is based on the seized documents (copy enclosed) is unsustainable for the following reasons:

(i) The contract was given to M/s. M. K. Constructions on a back-to back basis and, hence, the assessee is not concerned with the expenditure incurred by the sub-contractor.

(ii) The assessee is not concerned with the expenditure as the payment is made to the subcontractor only when the corresponding payment is received from the client. However, in the present case, the contract was delayed due to certain reasons attributable to the client and in order to support the subcontractor, the payment was realized even prior to the corresponding receipt from the client. Therefore, the assessee had undertaken the exercise of examining the expenditure incurred by the subcontractor. The entire contract is based on principal-to-principal transaction and, hence, disallowance cannot be made in respect of expenditure allegedly incurred by the subcontractor. All the arguments made with respect to ground no. 2 and 3 of assessee's appeal for A.Y. 2009-10 are applicable in respect of this ground also.

52. Per contra, ld.DR relied upon the orders passed by the lower authorities.

53. Heard the rival submissions of both the parties and perused the material available on record. The Assessing Officer had disallowed the payment made by the sub-contractor being illegal payment reimbursed by the assessee. The Assessing Officer had noted that though the assessee was given back-to-back contract to the sub-contractor, however, the bills were paid directly to the assessee and in turn the assessee pays the amount to its sub-contractors. Once it comes on record that the sub-contractors were paid the commission for getting the bills cleared which was reimbursed by the assessee based on the impounded documents, Assessing Officer had made the addition. However, on appeal, the ld.CIT(A) had also confirmed the addition made by the Assessing Officer and the finding of the ld.CIT(A) are given in para 6.5 and 6.6 of the order. Though it is the case of the assessee that after giving back-to-back contract, the assessee was not concerned with the expenditure incurred by the sub-contractors. If we look into the impounded documents examined by the Assessing Officer as well as the ld.CIT(A), then in the claim of the said M/s. MK Constructions, the amount appears to be the commission paid to the department as illegal money seems to be correct. In our considered opinion, no deduction can be claimed by the assessee within the meaning of section 37 of the Act in respect to the money paid for getting its bill cleared as expenditure. At sheet No.32 found during the course of search, the departmental expenses were mentioned as under :

1. Department Commission @ 6% of ... Rs.14,84,995/-.
   Rs.6,11,46,330/-. (Rs.36,68,780/- out of
   which Rs.2183785/- was shown as paid and
   Rs.14,84,995/- to be payable).

2. Adjustment ADJ Extra Quantities ..Rs.71,50,000/-
   (57.50 lakhs + grounding Rs.12 lakhs
   + earth work Rs.2 lakhs).

The Revenue had added both the amount of Rs.36,68,780/- and Rs.71,50,000/- as commission paid by MK Constructions to the department. As per the document seized from the premises of assessee, (Page 68) the various percentages were fixed for paying out to the Commissioner to Sub-Engineer totaling to 7.80%. Therefore, at the bottom, it was mentioned as it shall be less than 5%. Even if, if we apply the rate of 7.80%, then also the addition made by the Assessing Officer and confirmed by the ld.CIT(A) would be much higher as 6% the contract value comes to Rs.36,68,780/-. Therefore, we found that only illegal payment made by the sub-contractor and reimbursed by the assessee would not be more than this amount of Rs.36,68,780/-.

54. However, with respect to the extra quantity, payment of Rs.71,50,000/- though it was mentioned as departmental expenditure, but nothing was brought on record to show extra quantities, grounding and earth work done by MK Constructions would form part of the department commission. In view of the above, we do not find that the amount of Rs.71,50,000/- can be said to be commission on illegal payment. The document which

forms basis for the addition do no show that it was a commission paid by the MK Construction or by the assessee for clearance of its bills. In view of the above, we are of the opinion that the commission paid by the assessee to an amount of Rs.36,68,780/- is required to be sustained being illegal / gratification money and the remaining amount of Rs.71,50,000/- is required to be deleted and accordingly, we delete the same. Thus, this ground is partly allowed.

55. In the combined result, the appeals of the assessee in ITA Nos.74 and 75/Hyd/2017 are partly allowed, the appeal of assessee in ITA No.73/Hyd/2017 is dismissed and all the appeals of Revenue i.e., ITA Nos.77 to 80/Hyd/2017 are dismissed.

Order pronounced in the Open Court on 31st January, 2024.

Sd/-	**Sd/-**
(R.K. PANDA) **VICE-PRESIDENT**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 31st January, 2024
Vinodan/SPS

Copy to:

S.No	Addresses
1	NCC Ltd, NCC House, Sy. No.64, Madhapur, Hyderabad 500081
2	Dy.CIT Central Circle 1(1) Aayakar Bhavan, Hyderabad
3	Pr. CIT -Central, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order