IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI BR BASKARAN, AM & SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. Nos. 3021, 3022, 3023 & 3024/Mum/2023
(**निर्धारण वर्ष** / Assessment Years: 2013-14, 2014-15, 2015-16 & 2017-18)

Konark Infrastructure (Water Supply-UMC) (J/V) 1st Floor, Sapna Talkies, Konark Plaza, Near Sapna Garden, Ulhasnagar 42100.	**बनाम** / Vs.	DCIT, Central Circle – 4 6th Floor, Ashar IT park, 16Z, Waghle Estate, Thane (W)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAK9702G		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं/ I.T.A. Nos. 3058, 3061, 3060 & 3059/Mum/2023
(**निर्धारण वर्ष** / Assessment Years: 2013-14, 2014-15, 2015-16 & 2017-18)

DCIT, Central Circle – 4 6th Floor, Ashar IT park, 16Z, Waghle Estate, Thane (W)	**बनाम** / Vs.	Konark Infrastructure (Water Supply-UMC) (J/V) 1st Floor, Sapna Talkies, Konark Plaza, Near Sapna Garden, Ulhasnagar 42100.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAK9702G		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Vijay Mehta
Revenue by:	Shri Biswanant Das, CIT DR

सुनवाई की तारीख / Date of Hearing: 06 & 14/02/2024
घोषणा की तारीख /Date of Pronouncement: 27/02/2024

आदेश / O R D E R

PER BENCH

All these appeals preferred by the Revenue and the assessee are against the orders of the Ld. CIT(A)-11, Pune, all dated 30-06-2023 for AYs 2013-14, 2014-15, 2015-16 & AY 2017-18. Since the issues involved are common, all the appeals have been heard together. Both the parties also raised similar arguments on these

issues. Accordingly, we dispose off all these appeals by this consolidated order for the sake of convenience.

2. Brief facts of the case are that, the assessee is a joint venture formed for the purposes of carrying out the contract for laying water pipe lines in Ulhasnagar, whose co-venturers were M/s Konark Infrastructure Ltd ('KIL') and Shri U.M. Rupchandani, promoter of M/s Eagle Infra India Ltd. Search action u/s 132 of the Act was conducted upon the Konark Group on 23.01.2018 and during the course of search several incriminating documents pertaining to the assessee were found and seized. It is noted that, the Assessing Officer ('AO') had recorded the satisfaction both in the file of KIL as well as the assessee and accordingly issued notices u/s 153C of the Act upon the assessee inter alia for AYs 2013-14 to 2017-18. Prior to the issue of notice u/s 153C of the Act, the income-tax assessment for AY 2013-14 stood already completed u/s. 245D(4)/143(3) of the Act on 03.12.2014 in which the Income-tax Settlement Commission, Mumbai ('ITSC') had rejected the books of accounts and estimated the profits of the assessee JV from this water pipeline project at 8%. Following the same, the assessee is noted to have filed the returns of income u/s 153C of the Act estimating the income from this same project. The comparative details of the return of income originally filed and the return filed u/s 153C of the Act for the AYs before us are as under: -

AY	Date of filing of return u/s 139(1)	Returned Income	Date of filing of return u/s 153C	Returned Income as per return filed u/s 153C	Additional filed Income
2013-14	30/11/2023	2,48,74,664	31/05/2019	11,74,30,740	9,25,56,076
2014-15	26/11/2014	4,79,14,081	15/06/2019	7,31,29,640	2,52,15,559
2015-16	31/03/2017	92,96,300	12/06/2019	1,36,55,760	43,59,460
2017-18	-	-	31/05/2019	(35,81,960)	Nil

3. The summary of the additions/disallowance in Rupees made by the AO, which are in dispute in the cross appeals for AYs 2013-14, 2014-15, 2015-16 & 2017-18, are as follows:

Issue	AY 13-14	AY 14-15	AY 15-16	AY 17-18
Disallowance of bogus purchases from thirty (30) vendors	-	21,76,83,384	16,18,42,702	-
Disallowance of sub-contract payments made to IDCC	7,58,96,520	3,50,25,722	6,24,34,012	-
Protective Addition on account of unexplained cash credit	-	-	-	8,00,00,000

4. We first take up the appeal of the assessee and Revenue for AY 2013-14. Ground No. 2 of the assessee's appeal in ITA No.3021/Mum/2023 relates to the legal validity of the impugned assessment order dated 30.12.2019 passed u/s 153C/143(3) for the relevant year, and therefore we deem it fit to adjudicate it first. It is noted that, the assessee JV was formed with the sole intent and purpose of executing the contract of laying water pipelines in Ulhasnagar Town-awarded by local authority i.e. Ulhasnagar Municipal Corporation ('UMC') whose work commenced in 2009. For the relevant AY 2013-14, the assessee had filed the return of income on 30.11.2013 declaring total income of Rs.2,48,74,664/- u/s 139(1) of the Act. While the income-tax assessment for the relevant AY 2013-14 was pending, the assessee had filed an application u/s 245C(1) of the Act for AYs 2011-12 to 2013-14 wherein it had offered additional income to tax. It is gathered that, the then AO was in the possession of information that the assessee had transacted with suspicious VAT hawala dealers and that certain purchases of the assessee in relation to the aforesaid water pipeline contract was

bogus. The assessee accordingly approached the Settlement Commission offering 8% of the aggregate gross receipts from this project by way of income in these AYs including AY 2013-14. The Income-tax Settlement Commission, Mumbai passed the order of settlement u/s 245D(4) of the Act dated 03.12.2014, assessing the total income at Rs.11,74,30,736/- for AY 2013-14. The said order of settlement had since attained finality. Pursuant to the search action conducted on 23.01.2018, the AO reopened the concluded assessment of assessee JV for AY 2013-14 by issue of notice u/s 153C of the Act. The AO is noted to have re-assessed the total income of the assessee JV from the water pipeline project at Rs.19,33,27,260/-, after making addition of Rs.7,58,96,520/- on account of bogus contractual payments made to M/s Inderdeep Construction Company ('IDCC').

5. Assailing the action of the AO, the Ld. AR for the assessee submitted that, an assessment year that has been covered by an order of settlement cannot be disturbed or re-opened again u/s 148 / 153A / 153C of the Act. The Ld. AR pointed out that, the assessee JV had carried out one single contract during the relevant year and that the Settlement Commission had finally settled the taxable income for AY 2013-14 qua such contract undertaken for UMC and that the final assessment order pursuant thereto had been passed by the Assessing Officer. According to him therefore, no further income in relation to the same contract could be again re-assessed by the AO. The Ld. AR accordingly contended that the AO's action of reopening the settled income for AY 2013-14 by issue of notice u/s 153C of the

Act and re-assessing the total income at Rs.19,33,27,260/- by making further addition on account of bogus purchases was unjustified in law and he thus urged that the impugned order be quashed.

6. Per contra, the Ld. DR appearing for the Revenue supported the action of AO. He argued that, the assessee had not placed the order of ITSC before the AO and therefore he cannot seek shelter of this order now. According to him, search action was conducted upon the Konark Group on 23.01.2018, which was much after the date of order of ITSC and since further incriminating material had come to light that the income for AY 2013-14 had escaped assessment, the AO was well within his powers to initiate proceedings u/s 153C of the Act in relation to the already concluded assessment for AY 2013-14.

7. Heard both the parties. In order to appreciate this legal contention raised by the assessee, it is first necessary to refer to the provisions of the Act relating to the jurisdiction, powers etc. of the ITSC. Section 245C provide for application for settlement of cases and permits an assessee to approach the ITSC with a full and true disclosure of its income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived and the additional amount of income tax payable on such income and such other particulars as may be prescribed and have the case settled by the ITSC. The assessee can approach the ITSC *"at any stage of a case relating to him"* under sub-section (1). The word *"case"* was originally defined in clause (b) of Section 245A as *"any*

proceeding under this Act for the assessment or reassessment of any person in respect of any year or years, or by way of any appeal or revision in connection with such assessment or reassessment, which may be pending before an income tax authority on the date on which an application under sub-section (1) of Section 245C is made". With effect from 01.06.2007, the Finance Act, 2007 amended the definition of the word *"case"* to mean *"any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which the application under sub-section (i) of Section 245C is made"*. On receipt of application, the ITSC has to issue a notice to the applicant requiring him to explain why the application be allowed to be proceeded with and after hearing the applicant an order shall be passed permitting or rejecting the application to be proceeded with. This has to be done within a time frame. This order is to be passed under Section 245D (1). Sub-section (4) of the Section provides as under: -

> "(4) After examination of the records and the report of the Commissioner, if any, received under -
>
> (i) sub-section (2B) or sub-section (3), or
>
> (ii) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007,
>
> and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it,

> the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner."

8. Sub-section (6) of Section 245D provides that every order passed under sub-section (4) shall stipulate the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due in the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the ITSC that it has been obtained by fraud or misrepresentation of facts. Sub-section (7) provides that where a settlement becomes void, the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the ITSC and the income tax authority concerned may complete such proceedings at any time before the expiry of two years from the end of the financial order in which the settlement became void.

9. Section 245E empowers the ITSC, for reasons to be recorded in writing, to reopen any proceeding connected with the case which has been completed under the Act before the application under Section 245C was made. The caveat is that this can be done by the ITSC only for the proper disposal of the case pending before it. There are other conditions by which the power is hedged but they are not relevant for our purpose. Section 245F provides for the powers

and procedures of the ITSC. Sub-section (1) says that in addition to the powers conferred upon it by Chapter XIX-A, the ITSC shall have all the powers which are vested in an income tax authority under this Act. Sub-section (4) declares, for the removal of doubt, that *"in the absence of any express direction by the Settlement Commission to the contrary nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission"*. Section 245H empowers the ITSC to grant the assessee immunity from penalty and prosecution under the Act or under the IPC or any other Central Act in force. The immunity may be withdrawn if the assessee does not comply with the terms of the order of settlement or if it is shown that the assessee has conceded any particular material to the settlement or has given false evidence. Section 245-I provides for the conclusiveness of the order of settlement. It says that every order of settlement passed under Section 245D (4) *"shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter be reopened in any proceeding under this Act or under any other law for the time being in force"*.

10. Hence, a conjoint reading of the aforesaid provisions indicates that the ITSC is a high-powered body vested with powers to settle the case of an assessee. The order of settlement is conclusive as expressly stated in Section 245-I but the argument of the Revenue is that it is conclusive only with regard to matters stated in the order of settlement and in respect of matters not stated therein, the Assessing

Officer has the power to reopen the assessment. We however do not agree with this submission of the Revenue as they are overlooking the fact that the expenses/purchases in question formed part of the books of accounts, on the basis of which return of income was filed for AY 2013-14 and that the books for the relevant AY 2013-14 were rejected and total income was estimated at 8% of receipts by the ITSC. Under Section 245F(1), the ITSC, in addition to the powers conferred on it under Chapter XIX-A, shall have all the powers which are vested in an income-tax authority under the Act. By virtue of the provisions of Section 245F (2) once the application for settlement was filed and an order was passed allowing the application to be proceeded with, it was the ITSC which has the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act relating to the case, till the final order of settlement is passed under Section 245D (4). Thus, the moment the application of the assessee was allowed to be proceeded with by the ITSC till the final order of the settlement is passed on 03.12.2014, it was the ITSC which had exclusive jurisdiction in relation to the assessee's case. Therefore, all matters which could be examined by the Assessing Officer could be examined by the ITSC in these proceedings, including the expenses/ purchases in question before us. A harmonious reading of the provisions of the statute would show that it does not postulate the existence of two orders, each of a different income tax authority, determining the total income of an assessee for the same assessment year. If the contention of the Revenue is accepted, not only will the

finality of the order of settlement be disturbed, but it will also result in different orders relating to the same assessment year and relating to the same assessee being allowed to stand. According to us, such an act cannot be permitted in law. The only recourse to the Revenue to reopen the concluded assessment by an order of ITSC u/s 245D(4) was only in cases of fraud and misrepresentation and that also it should be through ITSC and not by AO.

11. It is to be noted that an order u/s 245D(4) of the Act is not an order of regular assessment. It is neither an order under section 143(1) or section 143(3) or section 144 of the Act. Under sections 139 to 158, the process of assessment involves the filing of return under sections 139 or 142 of the Act; inquiry by the Assessing Officer under sections 142 and 143 and making of the order of assessment by the Assessing Officer under sections 143(3) or 144 and issuing of notice of demand under section 156 on the basis of the assessment order. No such steps are required to be followed in the case of proceedings under Chapter XIX-A (Settlement Commission). The said Chapter contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under section 245D(4) of the Act.

12. Section 245-I of the Act, which bears the heading *"Order of settlement to be conclusive"*, postulates that every order of settlement passed under sub-section (4) of section 245D shall be conclusive as

to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force. An application under section 245C of the Act is akin to a return of income, wherein the assessee is required to make a full and true disclosure of his income and the order under section 245D(4) of the Act is in the nature of an assessment order. Therefore, assessment of the total income of the assessee for the assessment year in relation to which the Settlement Commission has passed the order under section 245D(4) of the Act stands concluded and in terms of section 245I of the Act, such order shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in Chapter XIX-A, be reopened in any proceeding under the Act or under any other law for the time being in force. Therefore, once an order is passed by the Settlement Commission under section 245D(4) of the Act, the same is conclusive insofar as the assessment year involved is concerned. Therefore, once an order has been passed under section 245D of the Act by the Settlement Commission, the assessment for the year stands concluded and the Assessing Officer thereafter has no jurisdiction to reopen the assessment.

13. Our above view finds support from the decision of the Hon'ble Gujarat High Court in the case of **Komalkant Faikirchand Sharma vs DCIT (108 taxmann.com 50)** wherein it was held as follows :-

> "7.4 Thus, in Brij Lal (supra), the Supreme Court has held that under the Act, there is a difference between

assessment in law [regular assessment or assessment under section 143(1)] and assessment by settlement under Chapter XIX-A. The order under section 245D(4) of the Act is not an order of regular assessment. It is neither an order under section 143(1) or section 143(3) or section 144 of the Act. Under sections 139 to 158, the process of assessment involves the filing of return under sections 139 or 142 of the Act; inquiry by the Assessing Officer under sections 142 and 143 and making of the order of assessment by the Assessing Officer under sections 143(3) or 144 and issuing of notice of demand under section 156 on the basis of the assessment order. The making of the order of assessment is an integral part of the process of assessment. No such steps are required to be followed in the case of proceedings under Chapter XIX-A. The said Chapter contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under section 245D(4) of the Act.

7.5 Moreover, the Supreme Court, in the above decision has held that the scheme of the said section is based on computation of total income and in that sense it has stated that such application for settlement is akin to a return of income. The said provision deals with 'total income'. Therefore, when section 245C deals with total income, all matters falling within the ambit of total income would stand concluded once the Settlement Commission settles a case and passes an order under section 245D(4) of the Act.

The order of the Settlement Commission would be final and conclusive subject to two qualifications, viz. fraud or misrepresentation. Moreover, when the settlement becomes void under section 245D(7) of the Act, the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission.

7.6 Section 245-I of the Act, which bears the heading "Order of settlement to be conclusive", postulates that every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force.

7.7 An application under section 245C of the Act is akin to a return of income, wherein the assessee is required to make a full and true disclosure of his income and the order under section 245D(4) of the Act is in the nature of an assessment order. Therefore, assessment of the total income of the assessee for the assessment year in relation to which the Settlement Commission has passed the order under section 245D(4) of the Act stands concluded and in terms of section 245I of the Act, such order shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in Chapter XIX-A, be reopened in any proceeding under the Act or under any other law for the time being in force. Therefore, once an order is passed by the Settlement

Commission under section 245D(4) of the Act, the same is conclusive insofar as the assessment year involved is concerned. When the section refers to matters not covered by such order, it refers to matters other than that covered under the assessment, viz. other than determination of the total income of the assessee for that assessment year. There may be matters in respect of the very assessment year which do not touch the determination of the total income of the assessee, like non-payment of advance tax or the like, which have no direct connection with the determination of the total income for that assessment year, which would not stand concluded by the order of the Settlement Commission. However, when section 245C of the Act requires the assessee to make a full and true disclosure of his income for the period in respect of which he has made such application, the order under section 245D(4) of the Act would relate to the determination of the total income of the assessee for that assessment year and such order is conclusive and cannot be reopened except as provided in that Chapter.

7.8 As to how the proceeding can be reopened is provided under section 245D(6) of the Act, which says that every order passed under section 245D(4) of the Act shall provide for the terms of settlement, including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

Therefore, the only ground on which an order of settlement made under section 245D of the Act can be reopened is that if it is subsequently found by the Settlement Commission that the order under section 245D(4) of the Act had been obtained by fraud or misrepresentation of facts. Therefore, once an order has been passed under section 245D of the Act by the Settlement Commission, the assessment for the year stands concluded and the Assessing Officer thereafter has no jurisdiction to reopen the assessment.

7.9 This court is in agreement with the view of the Bombay High Court in Mandhana Industries Ltd. (supra) and the Delhi High Court in case of Omaxe Ltd. (supra) wherein, the court held that the provisions of Chapter XIX-A of the Act make it abundantly clear that a case could either be dealt with by the concerned income tax authority or the Settlement Commission and not by both. The Act does not envisage a return of an assessee to be split into two parts, one for consideration before the Settlement Commission by way of settlement and another for normal assessment at the hands of the Assessing Officer or the appellate or revisional authority. In other words, if an application for settlement is allowed and the case is settled, the entire assessment for the assessment year in question would stand settled. The court held that the Act does not envisage parallel proceedings for the same assessment year concerning the same assessee.

7.10 The upshot of the above discussion is that once an order has been made by the Settlement Commission under section 245D(4) of the Act, the same is conclusive and

final in respect of the assessment for the assessment year in relation to which such order was passed and the Assessing Officer has no jurisdiction under section 147 of the Act to reopen an assessment made under section 245D(4) of the Act. That, however, does not mean that the Revenue is without remedy if at a subsequent stage it is noticed that the assessee had suppressed its actual income before the Settlement Commission. In view of the provisions of sub-section (6) of section 245D of the Act, an order made by the Settlement Commission under section 245D(4) of the Act shall provide for the terms of settlement, which should inter alia provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation. Section 245D(7) of the Act provides that where the settlement becomes void, as provided in sub-section (6) of section 245D, the proceedings in respect of the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The remedy, therefore, is not under section 147 of the Act, but under section 245D(6) read with section 245D(7) of the Act.

7.11 In the facts of the present case, since the Settlement Commission has passed an order under section 245D(4) of the Act in respect of the assessment year in relation to which the assessment is sought to be reopened, the Assessing Officer has no jurisdiction to invoke the provisions of section 147 of the Act and reopen an assessment, which has become conclusive. Such

> concluded assessment can only be reopened in case of fraud or misrepresentation of facts, as contemplated under sub-section (6) of section 245D of the Act. The assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act by issuing the impugned notice under section 148 of the Act is, therefore, invalid and without authority of law."

14. Gainful reference may also be made to the decision of the Hon'ble jurisdictional Bombay High Court in **Madhana Industries Ltd. v. Pr. CIT (103 taxmann.com 301)** wherein the Court has held that the Act does not envisage a return of an assessee to be split into two parts; one for consideration before the Settlement Commission by way of settlement and another for normal assessment at the hands of the Assessing Officer or the appellate or the revisional authority. In other words, if an application for settlement is allowed and the case is settled, the entire assessment for the assessment years in question would stand settled and the same cannot be reopened again. Identical view is noted to have been expressed by the Hon'ble Delhi High Court in **Omaxe Ltd. v. Asstt. CIT (209 Taxman 443)**.

15. It is further noted that the provisions of Section 153A or 153C of the Act starts with a *non-obstante clause* which reads as under: -

> "153A(1) - **Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153**, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003 but on or

> before the 31st day of March, 2021, the Assessing Officer shall…..[Emphasis given by us]

16. From the above it is *ex-facie* apparent that Section 153A or 153C of the Act, is overriding only Sections 139, 147, 148, 149, 151 & 153 of the Act. As rightly pointed out by the Ld. AR, it does not override the specific provision of Section 245-I of the Act, which provides that the orders passed by the ITSC shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force. In this regard, we take note of the legal maxim *expressio unius est exlcusio alterius*, which means that express mention of one is the exclusion of other [GVK Industries Ltd Vs ITO (2011) 4 SCC 36]. Following this legal maxim, since Section 153A overrides only the specific provisions, as stated hereinabove, then it clearly means that provisions of Section 245-I has been excluded and that it has not been overridden by Section 153A of the Act.

17. For the above reasons and in light of the above decisions (supra), we therefore hold that the AO erred in law by reopening the assessment for AY 2013-14 and made addition u/s 153C of the Act, which assessment had already been concluded and settled by ITSC, Mumbai, whose order had attained finality. As a consequence, the impugned order dated 30.12.2019 passed u/s 153C/153A/143(3) is held to be impermissible in law and is accordingly all additions made therein also stands deleted. Hence, Ground No. 2 of the assessee's appeal is allowed.

18. In view of our above findings, all other grounds raised by the assessee in their appeal in ITA No.3021/Mum/2023 as well as the appeal of the Revenue for the relevant AY 2013-14 in ITA No.3058/Mum/2023 have been rendered academic in nature and is therefore dismissed as infructuous.

19. We now take up the appeal of the assessee and Revenue in ITA Nos.3022/Mum/2023 & 3061/Mum/2023 for AY 2014-15. Ground Nos. 1, 2 & 4 of the Revenue's appeal and all the grounds taken by the assessee in their appeal relates to the addition of Rs.21,76,83,384/- made by the Assessing Officer in AY 2014-15 out of bogus purchases of Rs.37,95,26,087/- identified to have been made from thirty (30) vendors. The facts leading to the impugned addition are that, the Investigating authorities in the course of search had found and seized Page Nos. 18, 19, 20, 21 & 22 of Loose Paper Bundle No. 3, which according to them, suggested that the assessee JV had made bogus purchase payments to thirty (30) vendors aggregating to Rs.37,95,26,087/- across AYs 2014-15 & 2015-16. In the course of assessment, the AO first examined the document found and seized at Page No. 18 of Loose Paper Bundle No. 3. Analyzing the same, the AO noted that the first two columns contained the name of vendor and amount of purchases and that the third column represented the percentage of commission and the fourth column indicated the resultant figure after applying the percentage of commission to the amount paid. The relevant seized document has been extracted by the AO at Page 7 of the assessment order.

20. The AO had noted that, before the Investigating authorities, the Director of KIL was unable to explain the notings on the above Page. He further observed that, bills of only nine (9) parties out of the thirty (30) vendors were found in the course of search. It was also noted that, six (6) out of these nine (9) parties belonged to one Gursahani family and upon enquiry, Shri Gursahani failed to provide the relevant details viz., invoices, contract, work performed, ledger, labour register, books of accounts etc. citing that the records were stolen from him on 15.12.2014 and for which he provided an FIR copy as well. Since these six (6) parties were unable to provide any evidence of work performed and that the summons issued by the Investigating authorities were not complied with, the AO inferred that none of these thirty (30) vendors did any work for the assessee. The AO further noted that the assessee was only able to provide regular documents viz., bills, ledgers, proof of payments etc. in relation to all these vendors, but no evidence of the actual work performed was provided by the assessee.

21. The AO is noted to have further correlated Page No. 18 of Loose Paper Bundle No. 3 with Page Nos. 19, 20, 21 & 22 of Loose Paper Bundle No. 3. His analysis revealed that the figures mentioned on Page 19 correlated with the aggregate value of purchases & commission mentioned on Page No. 18. It was further noted that, the left hand side of Page No. 19, contained the aggregate value of purchases which suggested availability of cash funds, and the right hand side, which inter alia included commission value (found mentioned in Page No. 18), indicated utilization of these cash funds.

The other Page Nos. 20, 21 & 22, according to him, represented the actual affairs between the JV partners of the assessee which inter alia included the actual cash investment and withdrawals made by them. The AO noted that the amount of purchases found mentioned in Page No. 18 matched with the amount indicated as withdrawn in cash on the Page No. 19, which according to AO corroborated their suspicion that the payments made to the thirty (30) vendors were fake. The AO further analyzed the profitability of the assessee JV over the years and noted that the net profit ratio was very low which, according to him, further supported his foregoing analysis that the assessee had booked fake purchases to suppress its profits. Overall therefore, the AO concluded that the thirty (30) vendors found mentioned on Page No. 18 of Loose Paper Bundle No. 3 had not done any work for the assessee and that they were fake/accommodation entries meant only to evade the legitimate taxes payable. The AO accordingly disallowed the entire value of these purchases booked across AYs 2014-15 & 2015-16.

22. On appeal, the Ld. CIT(A) is noted to have called for two separate remand reports from the AO. After analyzing the submissions & rejoinders of the assessee in light of the above findings of the AO and his comments in the remand reports, the Ld. CIT(A) is noted to have passed a common appellate order for all the AYs before us. On the issue of fake purchases of Rs.37,95,26,087/-, the Ld. CIT(A) upheld the findings of the AO to the extent that, the assessee had failed to substantiate the genuineness of these expenses. The Ld. CIT(A) however held that, the disallowance of entire value

of these expenses was excessive and did not corroborate with the actual operating results of the assessee. The Ld. CIT(A) following several decisions of Hon'ble High Courts held that only profit element embedded in these bogus purchases ought to have been taxed by the AO. Taking into account the overall profitability and having regard to the order of ITSC in assessee's own case for earlier years, the Ld. CIT(A) held that net profit rate of 15% ought to have been earned from this water pipeline project. The Ld. CIT(A) accordingly restricted the quantum of addition viz., the profit element embedded in the purchases, to 15% of the contractual receipts across the years. Aggrieved by this order of the Ld. CIT(A), both assessee and Revenue are in appeal before us.

23. Supporting the order of the AO, the Ld. DR appearing for the Revenue contended that the AO had succinctly examined the incriminating documents being Page Nos. 18, 19, 20, 21 & 22 of Loose Bundle No. 3 and had rightly arrived at the conclusion that the purchases of Rs.37,95,26,087/- made from thirty (30) vendors were bogus. Referring to the non-attendance of summons by these vendors and the non-compliance of enquiries made by the Investigating authorities, the Ld. DR argued that all these vendors had actually performed no work and that they had only provided fake bills to the assessee. He showed us that, even the assessee had skirted from providing the whereabouts of these vendors but had only furnished the relevant bills, ledgers and proof of payments, which according to Ld. DR, is available in all cases of bogus purchases. The Ld. DR contended that, although the Ld. CIT(A) had rightly held that the

purchases were not genuine, but he assailed the Ld. CIT(A)'s action of not adding the entire value of bogus purchases but rather rejecting the books results and estimating the profit element at 15% of the contractual receipts for the relevant year. The Ld. DR in support of his contention relied upon the decision of the coordinate Bench in the case of **Pratibha Pipes & Structurals Ltd. in ITA Nos. 3874-3876/Mum/2015**. In this case, the Tribunal, following the decision of Hon'ble Supreme Court in case of N.K. Proteins Ltd (292 CTR 354), had upheld the addition of entire value of bogus purchases and rejected assessee's plea of estimating only the profit element embedded therein.

24. Per contra, the Ld. AR of the assessee submitted that, all the purchases and the payments to these thirty (30) vendors were supported by relevant bills, ledgers and proof of payments and a compilation running into more than 3000 pages were submitted before the lower authorities as well as before us. He thus claimed that the AO had erred in holding the same to be bogus in nature citing lack of proper evidence. Taking us through the background facts of the assessee JV, he reiterated that the assessee JV was formed in 2009 to undertake water pipeline project at Ulhasnagar. He explained that, since the project was already completed and the concerned personnel hired for this project had discontinued the job, it was practically difficult for KIL, the JV partner to trace the relevant work orders, labor registers, correspondences etc. in support of the work performed by these vendors. Hence for the aforesaid reason, the payments should not be viewed adversely. He further contended

that, none of the Directors or employees of KIL had anywhere admitted that the payments made towards the purchases in question were bogus. Referring to the statement of Shri N. Jethani, relied upon by the Revenue, he pointed out that, he had nowhere admitted to any wrong doing and that he was unable to explain Page No. 18 of Loose Bundle No. 3 for the reason that he was not involved in day to day workings of the JV. The Ld. AR further submitted that, non-attendance of summons by the vendors also could not be held against the assessee JV, when the assessee JV had provided all contemporaneous evidences which it was ordinarily required to maintain to substantiate the purchases. For this, he relied upon the decision of Hon'ble Bombay High Court in the case of **CIT Vs Nikunj Eximp Enterprises Pvt Ltd (372 ITR 619)**.

25. The Ld. AR further submitted that, to execute this magnitude of project, the assessee JV had to engage several vendors and thus it was practically not possible for assessee JV to be in regular touch with each of them and be aware of their whereabouts, even post completion of the contract. He explained that the payments in question were majorly made to local labor contractors who dealt in manual labor and understandably were not well educated and that their books of accounts etc. were maintained in thorough and formalized manner. The assessee JV had come into contract with these local labor contractors through their ground team who were executing the project and thus it was not a case that the JV partners had been engaging their services regularly across all their projects. According to Ld. AR, the Page Nos. 18 & 19 referred to by the

Revenue to allege these payments to be bogus purchases were only loose papers having no evidentiary value and thus ought not be relied upon. Even otherwise, according to him, the notings on these Pages were rough estimates / projections and did not suggest that the payments made to vendors were bogus.

26. The Ld. AR further provided an analysis of the total cost incurred towards the water pipeline project and showed that the aggregate labor cost (which was the major component of the impugned payments in question) was 33.09% of the total cost. Referring to the industry average and the MVAT Rules, he submitted that, labour cost being 30% of the total cost is standard as per the industry norms. He thus argued that, the aforesaid analysis also supported the assessee's case that the payments made to the vendors in question were not bogus in nature. He further showed us that, going by AO's analogy, and if the impugned payments are disbelieved, then the labor cost incurred would only be 7.46% for the overall value of the water pipeline project, which is apparently incongruous. The Ld. AR further showed us that, if the impugned addition made by the AO is taken into consideration, then the total income of the assessee JV works out 39% and 142% of the gross receipts, which is also ex-facie illogical and that earning such humungous profits in a government contract was a nearly impossible situation. The Ld. AR alternatively submitted that, if the Revenue was not satisfied with the details provided in support of the expenses debited to the books of accounts, then the correct course was to reject the same and estimate the overall profits of the assessee JV from this

water pipeline project. According to him, having regard to the presumptive provisions contained in Section 44AD of the Act and also the order of ITSC in assessee's own case for earlier years, the net profit rate of 8% of contractual receipts was fair and reasonable and that the assessment of total income ought to be restricted to that extent.

27. We have heard both the parties and perused the material placed before us. From the facts on record, it is noted that the assessee JV was formed between two JV partners i.e. KIL & M/s Eagle Infra India Ltd (formerly known as ECC), later on substituted by Shri U.M. Rupchandani with the intent and purpose to undertake and execute water pipeline project at Ulhasnagar. In the course of search conducted upon the premises of the JV partner, KIL, certain loose papers are noted to have been found. It is observed that, Page No. 18 of Loose Bundle No. 3 contained notings of the expenses paid to the thirty (30) vendors in question, against which certain percentage of commission was also mentioned. The amounts on this Page correlated with certain notings on other Page No. 19 of the same Loose Bundle. We further note that, the figures against each vendors mentioned on Page No. 18 fully correlated with the books of the assessee JV. According to us therefore, these loose papers cannot be said to contain dumb notings and that the assessee was required to explain the same. Hence, the preliminary plea of the assessee that these Pages being loose in nature does not have evidentiary value and thus has to be straightaway discarded cannot be countenanced.

28. Having held so above, it is well settled in law that, the contents of the loose papers ought to be such that, it is possible to decipher the nature of transaction, ascertain the year qua which it pertains to and quantify the taxable income qua the assessee. Having regard to the analysis undertaken by the lower authorities, indeed, there arises a suspicion regarding the genuineness of the payments made to these thirty (30) vendors. The notings found in Page No. 18 suggests calculation of commission and the total amount of purchases mentioned on this Page is the exact number mentioned on subsequent Page No. 19, which appears to suggest details of cash available and cash spent. Hence, the analysis and the inference drawn by the AO is found to be actionable. This analysis was however only the starting point of investigation. The Revenue however ought to have brought on record further corroborative material to support their analogy that the entire value of these payments had come back and remained unaccounted in the hands of the assessee. We take note of the fact that, the assessee had provided the relevant supporting evidence such as invoices, ledgers, proof of payments etc. which it was ordinarily required to substantiate the genuineness of these purchases. Also, there was no statement made by any Directors of the assessee Group averring that these payments found noted on these loose papers were not genuine. However, at the same time, none of these parties complied with the enquiries made by the AO. None of them provided their work orders, financials, audit reports, details of expenses incurred, bank statements etc. to justify the work done for the assessee. Amongst the thirty (30) parties, Shri Gursahani

who represented six (6) parties attended the enquiry and admitted to undertaking work viz., providing labour to the assessee but was unable to provide any of the details as sought by the AO and the reason given by him was theft, for which copy of FIR was provided. The fact however remains that, independent enquiries from the vendors could not be made. Overall therefore, we are in agreement with the Ld. CIT(A) to the extent that the assessee was unable to fully discharge the genuineness of these payments made to the thirty (30) vendors.

29. In view of our above findings, the next issue for consideration is whether the entire value of payments made to the vendors was to be disallowed or only the profit element embedded therein was to be taxed in hands of the assessee, in the facts and circumstances of this case. In case, the profit element is taxable, then what should be the quantum is also to be decided upon. On this aspect, the Ld. DR has relied upon the decision of **Pratibha Pipes & Structurals Ltd. (supra)** to support the AO's action disallowing the entire value of payments. In the instant case, the assessee is noted to have made purchases from several parties. It was noted that unlike other purchases, in twenty-two instances, the assessee was unable to provide any evidences, details, confirmations etc. to support the purchases. It was also noted that were no entries found in goods register towards such purchases, there were no delivery challans, evidence of transport etc. There were no corresponding details of sales available. Further, even the notices issued by the AO were not served upon any of them. It was also gathered that each of them were

found to be bogus hawala dealers by the authorities. On these specific facts, it was held that, the assessee was unable to prove whether these payments were made actually towards any purchases and thus entire value was added. It is relevant to note that, the Tribunal had taken note of the jurisprudence where purchases are bogus, only profit element embedded in those purchases needs to be taxed, but, found the facts of this case to be different as the whole purchases were proved to be non-existent and that the were payments made to hawala dealers. The facts of the present case are however noted to be factually distinguishable from this decision (supra). The present case before us does not involve payments to hawala dealers. It is also not the case that there are no corresponding receipts. Instead, the assessee has demonstrated that it had indeed undertaken the project, completed it and derived revenues therefrom.

30. We note that there are a series of judgments of the Hon'ble jurisdictional Bombay High Court and this Tribunal wherein it has been held that, where sales/revenues are not in doubt, then only the profit element embedded in the purchases has to be brought to tax and that the entire value of purchases cannot be disallowed. We find that the Ld. CIT(A) had taken note of several judicial precedents, which are as follows :-

> 87.1 In the case of **PCIT vs Mohommad Haji Adam & Co 103 taxmann.com 459 (Bombay HC),** the Hon'ble jurisdictional High Court has held as under:-
>
> > 8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were

indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases.

87.2 Similar principle was followed by the Hon'ble jurisdictional High Court in the case of **PCIT Central-4 vs Paramshakti Distributors Pvt Ltd (ITA No. 413 of 2017)** delivered on 15th July, 2019 wherein the Hon'ble HC has held as under:

"2. The first question pertains to restricting the addition of Rs.23.16 Lakhs to Rs.2,21,600/- by the Tribunal. The Assessing Officer had made the said addition on the ground that the assessee's purchases were found to be bogus. The entire purchase amount was therefore, added to the assessee's income. The Tribunal, however, restricted to the said sum of Rs.2,21,600/-. The Tribunal recorded that the Assessing Officer has not rejected either the purchases or

the sales made out of the said purchases. The Tribunal therefore, was of the opinion that the addition should be restricted to 10% of the total purchases. The Revenue strongly disputes this proposition.

3. Without elaboration, what the Tribunal by the impugned Judgment held is that the Department had not rejected the instance of the purchases since the sales out of purchase of such raw material was accounted for and accepted. With above position, the Tribunal applied the principle of taxing the profit embedded in such purchases covered by the bogus bills, instead of disallowing the entire expenditure. We do not find any error in the view of the Tribunal. No question of law arises."

87.3 Similarly in the case of **PCIT-13 vs Rishabhdev Technocable Ltd [2020] 115 taxmann.com 333 (Bombay),** the Hon'ble Bombay High Court has reiterated the principle that in cases where sales are accepted by the assessing officer, only the profit element embedded in purchases would be subjected to disallowance and not the entire amount of purchases. The relevant portion of the decision is reproduced as under:

14. We have carefully considered the submissions made by learned standing counsel and have also perused the materials on record.

15. We have already discussed the context in which the Assessing Officer had made the additions. We have also noted that in the appellate proceedings before the first appellate authority *i.e.* CIT(A) the quantum of purchases was enhanced from Rs. 24,18,06,385.00 to Rs.

65,65,30,470.00. Having raised the quantum of purchases as above, CIT(A) posed a question to itself as to what should be the treatment of purchases; whether the same should be added back to the taxable income of the assessee as a whole or only profit margin should be added back. After referring to various case laws on the subject, CIT(A) returned a finding of fact that assessee had made circular purchases and sales with 12 parties as disclosed in the sales tax return. Though genuineness of the purchases and sales were not proved, yet it was noted that the Assessing Officer had accepted the sales and gross profit declared in the return of income. CIT(A) held that there can be no sales without purchases. When the sales were accepted, then the entire purchases could not be disallowed. Referring to a decision of the Gujarat High Court in the case of *CIT* v. *Bholanath Polyfeb (P.) Ltd* . [2013] 40 taxmann.com 494/[2014] 220 Taxman 82/(Mag.)/[2013] 355 ITR 290 (Guj.) CIT(A) held that only the profit element embedded in purchases would be subjected to tax and not the entire amount. Having said so, CIT(A) noted that the gross profit rate of the assessee showed a decreasing trend over the years. In such circumstances, CIT(A) took the view that 2% of the purchases of Rs. 65,65,30,470.00 would be a fair and reasonable profit percentage which should be added to the income of the assessee, deleting the balance amount.

16. While doing so, CIT (A) observed that only reasonable profit on the purchases made from the hawala party should be added back to the income of the assessee. Relevant

portion of the order of the CIT (A) is extracted hereunder:—

> "2.7 From the perusal of the decisions of the Hon'ble courts on this issue, specially the decision of the Hon'ble Bombay High Court in the case of *CIT* v. *Nikunj Eximp Enterprises (P.) Ltd*. (*supra*), it was clearly held that the A.O. and the CIT (A) had disallowed the amount of Rs.1.33 crores on account of purchases merely on the basis of suspicion because the sellers and the canvassing agents have not been produced before them. The Hon'ble Mumbai Tribunal in the case of *Saroj Anil Steel (P.) Ltd*. v. *ITO* vide order dated 30-10- 2012 has also decided this issue that only profit margin @ 1 % is to be added back. Similar view has been taken by the Hon'ble Tribunal Mumbai in the case of *Anil Goyal Exim (P.) Ltd*. v. *ITO vide* order dated 25-04-2005. The Hon'ble Gujarat High Court in the case of *CIT* v. *Bholanath Polyfab (P.) Ltd* ., 40 Taxman.com 494 has held that whether the assessee did purchase cloth and sell finished goods and purchasers were not traceable, profit element embedded in purchases would be subject to tax and not entire amount. From the facts of the present case, it is noticed that the assessee has made circular purchases and sales with 12 parties as declared in sales tax return. The genuineness of purchases and sales were not proved before the A.O. and even during the appellate proceedings. The A.O. has treated the purchases as bogus but accepted the sales and gross profit declared in the return of income. Now question arise whether there can be any sales without purchases. The answer is

always in the negative that no sales can be made without purchases. The situation can be that purchases may not be made from the parties from whom invoices have been obtained as mentioned by the A.O. in the assessment order. But when the sales are accepted then the whole purchases cannot be disallowed as held by various courts stated above. As per the decision of the Hon'ble Gujarat High Court in the case of *CIT* v. *Bholanath Polyfab (P.) Ltd*., it is clearly held that only the profit element embedded in purchases would be subject to tax and not the entire amount. Now the question arises how to determine the profit element. For this purpose, the total turnover and percentage of gross profit for the earlier three years was obtained from the AR of the appellant. It is noticed that in earlier years, the main business of the assessee was manufacturing and dealership of all kinds of industrial power control instruments and related items but in the year under consideration it has shown trading of Rs. 65,65,30,470/- out of the total purchases at Rs. 67,34,02,306/-. The gross profit shown in the year under consideration was at 5.71 % as against 8.77% in the preceding year. From the perusal of the submissions made by the AR of the appellant, it is noticed that the contention of the appellant was correct that in the earlier years the main business of the assessee was manufacturing and in the year under consideration the major activity is of trading. The gross profit rate was also decreasing every year and in the year under consideration it has decreased to 3%. It is also an established fact that the gross profit of trading activity is lower than the manufacturing activity. The

AR of the appellant has also offered that additional gross profit @ ½% of the turnover can be added back. But there is no reasonableness in adopting this ½% G.P. Keeping in view the principles of natural justice and the decision of the Hon'ble Courts on this issue, only the reasonable profit has to be added back on the purchases made from the hawala parties. The gross profit has been reduced from 8.77 % to 5.71% during the year under consideration which is explained as major manufacturing activity in the last year and major part of the trading activity in the year under consideration. Keeping in view of these facts and circumstances, I am of the view that 2% of the purchases made from the hawala parties amounting to Rs. 65,65,30,470/- which works out at Rs. 1,31,30,609/- is air and reasonable, hence, upheld and the balance addition made is deleted. Ground of appeal is partly allowed."

17. Before the Tribunal, Revenue expressed the grievance that CIT (A) had erred in disallowing bogus purchases at 2% being profit on purchases made by the assessee from the grey market. Tribunal *vide* its order dated 3rd November, 2016 held as under :—

"4. We have heard rival contentions and gone through the facts and circumstances of the case. Admitted facts are that the AO neither in the original proceedings nor during remand proceedings objected to sales made by assessee. In that eventuality it is imperative on our part to hold that there must be purchases. Whether the purchases are from Grey Market or whatever the assessee has made purchases although payments are

made to hawala dealers. In that eventuality it is to be seen whether the payments are recorded in the books of account or not. This fatum is not denied by Revenue, rather the assessee has proved that the payments are made through accounts payee cheques and purchases are entered in its books of account. Once the assessee is able to prove that the purchases were made only in alternative way, the revenue is to estimate the excess profit at a rate. Here, our difference is that 2% is reasonable or some higher profit is to be estimated. We are of the view that the assessee's gross profit varies from 5% to 8.77%, but these purchases are from Grey Market and its profit element is little higher and accordingly, we direct the Assessing Officer to make further addition of 3% of the bogus purchases and accordingly estimate the income. We direct the Assessing Officer accordingly. This issue of Revenue's appeal is partly allowed.".

18. Tribunal noted that it was an admitted fact that the Assessing Officer did not object to the sales made by the assessee. Therefore, it was evident that they were corresponding purchases. Having noted the above, Tribunal examined the books of accounts of the assessee wherefrom it was found that the assessee had made payments on account of the purchases through account payee cheques and the purchases were entered in its books of account. Thus, assessee was able to prove that the purchases were made only in the alternative way. If that be so, then Revenue was only required to estimate the profit at a particular rate. Referring to the figure of 2% arrived by the

CIT(A), Tribunal observed that assessee's gross profit varied from 5% to 8.77%. Since the purchases were made from the grey market, the corresponding profit element would be little higher. Therefore, Tribunal directed the Assessing Officer to make further addition of 3% on the bogus purchases and to estimate the income on such basis.

19. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. The lower appellate authorities had enhanced the quantum of purchases much beyond that of the Assessing Officer *i.e.*, from Rs. 24,18,06,385.00 to Rs. 65,65,30,470.00 but having found that the purchases corresponded to sales which were reflected in the returns of the assessee in sales tax proceedings and in addition, were also recorded in the books of accounts with payments made through account payee cheques, the purchases were accepted by the two appellate authorities and following judicial dictum decided to add the profit percentage on such purchases to the income of the assessee. While the CIT (A) had assessed profit at 2% which was added to the income of the assessee, Tribunal made further addition of 3% profit, thereby protecting the interest of the Revenue. We have also considered the two decisions relied upon by learned standing counsel and we find that facts of the present case are clearly distinguishable from the facts of those two cases to warrant application of the legal principles enunciated in the two cited decisions.

20. In *Bholanath Polyfeb (P.) Ltd*. (*supra*), Gujarat High Court was also confronted with a similar issue. In that case Tribunal was of the opinion that the purchases might have

been made from bogus parties but the purchases themselves were not bogus. Considering the fact situation, Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. Gujarat High Court upheld the finding of the Tribunal. It was held that whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal had concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

21. We are in respectful agreement with the view expressed by the Gujarat High Court.

22. Thus, we do not find any merit in this appeal. No substantial question of law arises from the order passed by the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.

87.4 Following this principle, the jurisdictional High Court in **PCIT vs. Pinaki D Panani (ITA No. 1543 of 2017) (Bombay HC)** held that

"Even if the purchases made by the assesse are to be treated as bogus, it does not mean that entire amount can be disallowed. As the AO did not dispute the consumption of the raw materials and completion of work, only a percentage of net profit on total turnover can be estimated."

87.5 The Hon'ble Bombay HC in the case of **PCIT vs. Jakharia Fabric (P.) Ltd. [2020] 118 taxmann.com 406 (Bombay)** held as under:

> 11. In the assessment proceedings Assessing Officer had relied upon information obtained from the Investigation Wing of the Department at Mumbai which in turn had obtained the information from the Sales Tax Department, Government of Maharashtra. The information was to the effect that the eight parties from whom the purchases were allegedly made were alleged hawala dealers who had issued bogus bills totalling Rs. 1,14,92,970.00.
>
> 12. In the appellate proceedings before the first appellate authority, it was held as under :—
>
> > "2.15 The facts in the present case shows that the appellant was not in a position to prove the existence of the suppliers. The suppliers were found to be engaged in providing bogus bills without actual delivery of goods. Moreover few of the suppliers are not regular parties and they were found to have supplied only during the year and there were no supply either in the earlier year or in the subsequent year from such parties. This circumstantial evidence also prove the bogus nature of the transaction. On careful analysis of the finding of Hon'ble High Court of Gujarat in the abovementioned cases, I am of the firm view that without purchase of materials it was not possible for the appellant to complete the job work of dying. As mentioned above the AO had never disputed or examined the aspect of job work receipts. Hence I am of the firm belief that the

appellant had made cash purchases from other parties which were not recorded in the books. The appellant took only bills from these 8 parties as accommodation to explain the purchases. Therefore the entire purchase from these 8 parties cannot be added as bogus and what needs to be taxed is the profit element embedded in such transaction. The appellant carryout only the job work of dying the cloths on a contract basis. Estimation ranging from 12.5% to 25% has been upheld by the Hon'ble Gujarat High Court depending upon the nature of the business. As held in the case of *Simit P. Sheth* (*supra*) no uniform yardstick could be applied to estimate the rate of profit and it vary with the nature of business. Taking all the facts into consideration and the findings of the Hon'ble Courts on this issue, I am of the view that estimation of 17.5% of profit would meet the ends of justice. Therefore, I direct the AO to estimate profit of 17.5% on the total alleged bogus purchase which works out to Rs. 20,11,270(17.5% of Rs. 1,14,92,970/-). The appellant get the relief of the balance Rs. 94,81,700/-. The grounds raised are partly Allowed."

13. Thus as can be seen from the above, CIT (A) had relied upon the decision of the Gujarat High Court in *Simit P. Sheth* (*supra*) and took the view that entire purchases from the eight parties could not be added as bogus but what needed to be added to the total income of the assessee was the profit element embedded in such transaction. CIT(A) noted that assessee carried out only the job work of designing the clothes on contract basis; profit estimation ranged from 12.5% to 25%. In the circumstances of the

case, CIT(A) took the view that taking of 17.5% as the profit would meet the ends of justice. Accordingly, Assessing Officer was directed to estimate profit of 17.5% on the total alleged bogus purchases and thereafter, to delete the balance amount of addition.

14. In further appeal Tribunal referred to the above finding of the CIT(A), whereafter it was held as under:—

> "6. Thus, from the aforesaid analysis, conclusions and findings recorded by the Ld. CIT(A), it is evident that total purchases were wrongly disallowed by the Assessing Officer. The Ld.CIT (A) took a reasonable view whereby the disallowance was sustained to the extent of estimated inflation in the amount of purchases made by the assessee. The disallowance sustained by the Ld. CIT(A) @ 17.5% of the purchases have been accepted by the assessee with a view to bury the litigation. Nothing has been brought before us by the Ld. DR to contradict the findings recorded by the Ld.CIT(A). The assessee's counsel has also placed reliance upon the judgment of Hon'ble Bombay High Court in the case of *Nikunj Eximp Enterprises Pvt. Ltd.* (*supra*) wherein similar issue has been decided on identical lines by the Hon'ble Bombay High Court. In our view, no intervention is required in the findings of Ld. CIT(A) and, therefore, the same is confirmed. The grounds raised by the revenue are dismissed."

15. Thus, Tribunal concurred with the view taken by the CIT(A) that the Assessing Officer had erred in disallowing the entire total purchases and adding the same to the total

income of the assessee. View taken by the CIT(A) that 17.5% of the purchases be added to the total income of the assessee as the profit element was a reasonable one. It was also noted that the said percentage was accepted by the assessee with a view to close the litigation. Nothing was brought on record by the Revenue to contradict the findings recorded by the CIT(A). Tribunal had also referred to the decision of this court in *CIT* v. *Nikunj Eximp Enterprises (P.) Ltd.* [2013] 35 taxmann.com 384/216 Taxman 171 (Mag.)/[2015]/384 ITR 619. Infact, this court has also held following the decision of Nikunj Eximp Enterprises Pvt. Ltd. that the revenue is required to furnish the information received from the Sales Tax Department or from the Investigation Wing of the Department to the assessee allowing the assessee to test the veracity of such information otherwise such information could not be relied upon. This court in the case of *Pr. CIT* v. *Vaman International (P.) Ltd.* [IT Appeal No. 1940 of 2017, decided on January 29, 2020] held as under:-

> "17.1 Thus, from the above, it is seen that Tribunal had returned a finding of fact that the assessee had filed copies of purchase bills, copies of purchase/sale invoices, challan cum tax invoices in respect of the purchases, extracts of stock ledger showing entry/exit of the materials purchased, copies of bank statements to show that payment for such purchases were made through regular banking channels, etc., to establish the genuineness of the purchases. Thereafter, Tribunal held that Assessing Officer could not bring on record any material evidence to show that the purchases were

bogus. Mere reliance by the Assessing Officer on information obtained from the Sales Tax Department or the statements of two persons made before the Sales Tax Department would not be sufficient to treat the purchases as bogus and thereafter to make addition under section 69C of the Act. Tribunal has also held that if the Assessing Officer had doubted the genuineness of the purchases, it was incumbent upon the Assessing Officer to have caused further enquiries in the matter to ascertain genuineness or otherwise of the transaction and to have given an opportunity to the assessee to examine/cross-examine those two parties *vis-a-vis* the statements made by them before the Sales Tax Department. Without causing such further enquiries in respect of the purchases, it was not open to the Assessing Officer to make the addition under section 69C of the Act.

18. We are in agreement with the view expressed by the Tribunal. In fact, Tribunal has only affirmed the finding of the first appellate authority. Thus, there is concurrent finding of fact by the two lower appellate authorities.

19. This Court in the case of *Commissioner of Income-tax -1, Mumbai* v. *Nikunj Eximp Enterprises(P.) Ltd.* 372 ITR 619; wherein an identical fact situation arose did not interfere with the order passed by the Tribunal and held that no substantial question of law arose from such order. It was held that merely because the suppliers had not appeared before the Assessing Officer, no conclusion could be arrived at that the purchases were not made by the assessee."

16. Today while dealing with Income-tax Appeal No. 1330 of 2017 (*Pr. CIT* v. *Rishabhdev Technocable Ltd.*) [2020] 115 taxmann.com 333 (Bom.), we have held as under:

> "19. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal. The lower appellate authorities had enhanced the quantum of purchases much beyond that of the Assessing Officer *i.e.*, from Rs. 24,18,06,385.00 to Rs. 65,65,30,470.00 but having found that the purchases corresponded to sales which were reflected in the returns of the assessee in sales tax proceedings and in addition, were also recorded in the books of accounts with payments made through account payee cheques, the purchases were accepted by the two appellate authorities and following judicial dictum decided to add the profit percentage on such purchases to the income of the assessee. While the CIT(A) had assessed profit at 2% which was added to the income of the assessee, Tribunal made further addition of 3% profit, thereby protecting the interest of the Revenue. We have also considered the two decisions relied upon by learned standing counsel and we find that facts of the present case are clearly distinguishable from the facts of those two cases to warrant application of the legal principles enunciated in the two cited decisions.
>
> 20. In *Bholanath Polyfab Limited* (*supra*), Gujarat High Court was also confronted with a similar issue. In that case Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering the

fact situation, Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. Gujarat High Court upheld the finding of the Tribunal. It was held that whether the purchases were bogus or whether the parties from whom such purchases were allegedly made were bogus was essentially a question of fact. When the Tribunal had concluded that the assessee did make the purchase, as a natural corollary not the entire amount covered by such purchase but the profit element embedded therein would be subject to tax.

21. We are in respectful agreement with the view expressed by the Gujarat High Court."

16. On thorough consideration of the matter, we do not find any error or infirmity in the finding returned by the Tribunal. No substantial question of law arises from such finding returned by the Tribunal.

87.6 The jurisdictional Bench of Hon'ble ITAT in a recent decision has followed the similar principle in the case of DCIT Vs. DBM Geotechnics and Construction (P.) Ltd [2022] 136 taxmann.com 345 (Mumbai – Trib.) and held as under:

"Where assessee's sales figures are not doubted, 100% disallowance for bogus purchases is not justified by drawing adverse inference on his inability to produce the suppliers. The facts of the case indicate that purchases were made by assesse from grey market. Making purchases through the grey market gives the assesse savings on account of non-payment of tax and others at the expenses of the exchequer. In the circumstances, CIT(A) is justified

in deleting 100% disallowance of purchases by AO and limiting disallowance to 12.5% out of the bogus purchases."

87.7 The Hon'ble Bombay High Court in the case of **PCIT-25 vs Ram Builders (ITA No. 398 of 2018) (Bombay HC)** dated 18/07/2022, while upholding the disallowance to the extent of 12.5% of bogus purchases has observed as under:

"7. Accepting the statement of the assessee that the addition be restricted to only proft element on the purchases efected by it, the CIT(A) by following CIT Vs. Bholanath Poly Fab Pvt. Ltd., and considering the facts and circumstances of the case, restricted the addition by estimating profit of 12.5% on the total purchases in question which works out to Rs.59,31,849/-. It thus, granted relief to the assessee to the tune of Rs.4,15,22,944/- (Rs.4,74,54,793/- – Rs.59,31,849/-).

8. The order passed by learned CIT(A) was challenged by the revenue before the Income Tax Appellate Tribunal. Cross objection was also filed by the assessee in the said proceedings. By virtue of order dated 28th February, 2017, the Tribunal dismissed the appeal as also the cross objection fled by the assessee and upheld the order of learned CIT(A).

9. Learned Counsel for the appellant urged that the view expressed by the Tribunal in upholding the order of learned CIT(A), dated 09th March, 2015 was untenable in law, inasmuch as the assessee had clearly failed to prove the genuineness of purchases made during the course of execution of the works, despite having been granted

opportunity to produce the twelve parties before the A.O. for purposes of verification.

10. The Tribunal upheld the findings recorded by the learned CIT(A) on two grounds. Firstly, that the consumption report with regard to material purchases had never been controverted by the A.O and secondly that the completion certificate in regard to the contract works submitted by the assessee had been accepted by the A.O., in the light of which, it could not be said that the purchases were totally bogus and consequently ought not to be fully disallowed. The Tribunal also upheld the addition estimated at Rs.59,31,849/- based upon estimated proft at the rate of 12.5% on the total purchases in question.

11. We have heard learned Counsel for the appellant.

12. We are of the opinion that the view expressed by the Tribunal in upholding the order passed by the learned CIT(A), cannot be said to be in any manner perverse or legally untenable, inasmuch as, if the entire amount of Rs.4,74,54,793/- were to be held as non-genuine purchases, then it would not be possible to justify as to how the works allotted to the assessee for execution by the semi Government Agencies could be completed. Therefore the argument that the entire amount of Rs.4,74,54,793/- ought to have been added to the income of the assessee is untenable, especially when the learned CIT(A) in its order as upheld by the Tribunal in the order impugned held that the purchases per se were not in dispute but the parties from whom the purchases are shown to have been made are disputed.

13. In our opinion, the order passed by the Tribunal is legally valid warranting no interference."

87.8 The jurisdictional High Court in a recent decision dated 10th June, 2022 has followed the similar principle in the case of **PCIT vs Batliboi Environmental Engineering Ltd [2022] 141 taxmann.com 245 (Bombay)** and held as under:

"4. As regards first question, the Tribunal has upheld the finding and conclusion of the Commissioner of Income-tax (Appeals) whereby the Commissioner (Appeals) directed the Assessing Officer to disallow 12.5% bogus purchases and to add 12.5% of the amount of purchases as income of the Appellant. The argument advanced is that the bogus purchases ought to have been disallowed in totality. The learned counsel for the parties have placed before us the decisions of the Division Bench in the cases of *Pr. CIT* v. *Mohommad Haji Adam & Co.* [2019] 103 taxmann.com 459 (Bom.) and *Pr.CIT* v. *Paramshakti Distributors (P.) Ltd.* [IT Appeal No. 413 of 2017, dated 15-7-2010] wherein the Division Bench has observed that if the factum of sales has been accepted by the Department then even if it is established that there were bogus purchases, it is not necessary that entire amount should be added to the income of the Assessee as there cannot be a sale without purchase. The facts of the present case are identical wherein the sales have been accepted. Therefore, in light of the aforesaid decisions first question of law does not survive for consideration."

87.9 In the latest judgement of Hon'ble Bombay High Court in the case of PCIT Vs. Vishwashakti Construction

(ITA No. 1016 & 1026 of 2018) dated 4th May 2023, the jurisdictional High Court has followed the decision in the case of Ram Builders (supra) and held as under:

> 6. An appeal was preferred before the ITAT both by the assessee as also the revenue, which was finally decided by virtue of the order impugned dated 20th January, 2017, which is impugned in the present appeal. The Tribunal upheld the view of the CIT(A) to treat the purchases from ten parties as bogus and also upheld the view expressed by the CIT(A) to sustain the addition to the extent of 12.5% of the amount of the disputed purchases relying upon the decision of Gujarat High Court in the case of CIT V/s. Bholanath Poly Fab Pvt. Ltd.
>
> In a case involving a similar issue, even this Court in Income Tax Appeal No. 398 of 2018 decided on 18th July, 2022, had dismissed the appeal filed by the revenue on the ground that if the entire amount of purchases were to be held as non-genuine purchases, then it would not be possible to justify as to how the works allotted to the assessee for execution by the semi-Government Agencies, could be completed.
>
> 7. Even in the present case the Appellant is a contractor, who had been allotted a subcontract for carrying out civil works of road and buildings repairs for which various types of building materials are stated to have been purchased from several suppliers including the ten suppliers, who are alleged to have been providing accommodation entries. It is not denied that the works allotted had been completed for the concerned agency, which would have been otherwise

> impossible, if the entire purchases made by the Appellant were to be held as non-genuine.
>
> In our opinion the order passed by the Tribunal warrants no interference. No substantial questions of law arise in the present appeal.

31. The ratio laid down in the above judgments is binding upon us. Having perused the same, it is noted that, the question as to whether the profit ought to have been estimated or whether the entire payments is to be disallowed, is essentially a fact-based exercise. It is to be ascertained as to whether the assessee had recognized corresponding revenues as well, and if so, then it is only the profit element in the entire transaction which can be brought to tax. From the material placed before us, it is noted that the assessee had undertaken one single contract to construct water pipeline project in Ulhasnagar for which the agreed contract value was Rs.249.39 crores. It is gathered from the order of the Ld. CIT(A) that, the appellant had successfully completed the project as certified by UMC vide certificate dated 17.06.2022 and that the successful completion of the same was also certified by M/s TUSPL, an independent project management consultant appointed by UMC vide certificate dated 18.04.2023. Both these certificates were forwarded by the Ld. CIT(A) to the AO and it is noted that the AO has also confirmed in his remand report that, indeed the contract was completed by the assessee. Pursuant to the same, it is noted that the assessee had derived gross receipts of Rs.249.39 crores across the life of the project. On these given facts, it is evident that the assessee

had indeed performed the tasks allocated under the agreed contract with UMC, completed the water pipeline project and had derived revenues therefrom. Understandably therefore, the assessee could not have undertaken this huge project without incurring expenses viz., both material and labor. From the details furnished by the assessee before the lower authorities, it is noted that the assessee had claimed to have incurred labour cost of Rs.80.92 crores which comprised of 33% of the total revenues from this project. If the Revenue's proposition is taken at its face value i.e., the entire value of purported bogus payments has to be disallowed; then it would mean that against the water pipeline project from which the assessee derived revenues of Rs.295 crores, it had incurred labour costs of Rs.30.35 crores to undertake tasks involving excavation, laying of pipes, execution etc. which is only 11.49% of the total revenues. In our considered view, such a proposition is inherently flawed. The Ld. AR has shown us that even the MVAT Rules recognizes that labour component in any composite contract is 30% and therefore allows standard deduction accordingly. On these facts therefore, we are in agreement with the Ld. CIT(A) that the entire value of payments made to these vendors cannot added back to the total income of the assessee.

32. In fact, we note that, by disallowing the entire value of payments, the AO has effectively reduced the entire costs of the project to 65% of the revenues, which in our considered view, is improbable, particularly having regard to the fact that it was a government backed project. More specifically, it is noted that, as a

consequence of the disallowance of the entire value of expenses, the assessable profit works out to 39% and 142% of gross receipts for the AYs 2014-15 and 2015-16, which again is noted to be illogical. In view of the foregoing and at the same time, having regard to the fact that genuineness of the vendors in question could not be proved, we are in agreement with the Ld. CIT(A) that the correct course in the given facts of the present case is to reject the books of accounts and estimate the overall income of the assessee from this water pipeline project.

33. We note that, on similar facts and circumstances, the expenses incurred by another JV of KIL i.e. M/s Konark Infrastructure (SW-KDMC) (J/V) was disallowed in its entirety by the AO. However, on appeal this Tribunal in their order passed in ITA Nos. 2588 & 2589/Mum/2017 had taxed only the profit element embedded therein viz., 5% of purchases. Hence, for the reasons discussed in the foregoing, we accordingly hold that only the profit element embedded in the payments ought to be assessed to tax and that on the given facts, the disallowance of entire value of purchases was unwarranted.

34. Now we come to the issue of estimating the profits of the assessee JV. The Ld. CIT(A) is noted to have estimated the profit at 15% of the contractual receipts. We however note that no rational basis or logic has been provided by the Ld. CIT(A) for arriving at such a rate. On the other hand, the Ld. AR brought to our notice that, in earlier years, the ITSC had estimated the profit of the assessee JV

at 8%. Having gone through the facts, it is noted that, the assessee had filed an application before the ITSC, Mumbai to assess its income from this same water pipeline project at Ulhasnagar in AYs 2011-12 to 2013-14. Perusal of the order of ITSC shows that, like in the AYs before us, the Revenue had suspected bogus bills/expenses to have been debited in P&L A/c by the assessee JV. Accordingly, the assessee had approached Settlement Commission, which after examining the facts of the case and taking into consideration the issue of bogus purchases, had held that net profit rate of 8% of the gross receipts was fair and reasonable rate to estimate the overall income from this water pipeline project. This order of ITSC is noted to have attained finality and is therefore is found to carry binding value.

35. In the relevant AY 2014-15, the assessee had originally declared net profit of Rs.4.78 crores which was 5.7% of the gross receipts in the return filed u/s 139(1) of the Act. Following the above order of ITSC and having regard to the fact that the same contract was continued in the relevant AY 2014-15, we hold that the profit of the assessee for the year is to be estimated at 8% of the contractual receipts. The Ld. AR had pointed out to us that, the assessee had offered 8% of contractual receipts in the return of income filed u/s 153C of the Act. The AO is accordingly directed to verify this contention and ensure that the total income is finally assessed at 8% of the contractual receipts for the relevant AY 2014-15. With these directions, these grounds are disposed off. Hence, Ground Nos. 1, 2

& 4 of Revenue's appeal stands dismissed and the grounds taken by the assessee are partly allowed.

36. Ground No. 3 of the Revenue's appeal is against the Ld. CIT(A)'s action of deleting the contractual payments made to M/s Inderdeep Construction Company ('IDCC') which was disallowed by the AO. The facts as noted in brief are that, the AO had disputed the genuineness of the contractual payments made by the assessee to IDCC aggregating to Rs.29,99,72,505/- across AYs 2012-13 to 2015-16. After analyzing Pages 6 & 7 of Loose Bundle No. 3 along with Pages 3, 4, 20 & 21 the AO observed that the assessee had made noting of commission at the rate of 5% to M/s Eagle Construction Company ('ECC') which was owned by one of the JV partners, Shri U.M. Rupchandani towards the payments made to IDCC. The AO further observed that whenever payments were made to IDCC, ECC would thereafter record an amount of 2% less with the assessee. The AO accordingly suspected the transactions with IDCC to be bogus and show caused the assessee to explain the same. In response, it is noted that, the assessee had filed the ITRs, audit reports, VAT audit reports, service tax returns etc. of IDCC along with their registration with PWD in 'I-A' Category to prove the credentials of the contractor and genuineness of the transactions. The assessee further explained that, the calculations made on the foregoing loose papers were in respect of extra share of profit, which was claimed by ECC in the JV and nothing more than that. Although the AO acknowledged explicitly that IDCC is an established contractor and that it had done substantive work for the assessee but he inferred that

IDCC had assisted the assessee in obtaining fake expenses entries to the tune of Rs.29,99,72,505/-. The AO held that, the money paid by the assessee to IDCC would come back through ECC in IDCC cheque account. The AO thus concluded that the payments made to IDCC were bogus and accordingly disallowed and added back aggregate sum of Rs.29,99,72,505/- across AYs 2012-13 to 2015-16.

37. Being aggrieved by the above order, the assessee preferred appeal before the Ld. CIT(A) who, after extensively analyzing the details and evidences furnished by the assessee as well as IDCC, concluded that these payments were genuine and hence deleted the same. The Revenue is now in appeal before us.

38. The Ld. DR appearing for the Revenue first invited our attention to Page Nos. 29-38 of the impugned order in which the AO had extracted the relevant seized material and his analysis, basis which the AO had inferred that the contractual payments made to IDCC, were not genuine. The Ld. DR particularly referred to Page Nos. 6 & 7 of the Loose Bundle, in which there were entries in relation to commission @ 5% to the JV Partner ECC in respect of the payments made to IDCC. This ledger, according to the Ld. DR, suggested that the payments which went to IDCC came back through ECC. He also referred to the pattern of 2% reduction in the amounts deposited by ECC and amounts paid to IDCC, which according to him showed that ECC was giving back the payments after reducing their commission. The Ld. DR further argued that IDCC did not provide proof of actual work done which further corroborated the

suspicion of the AO regarding its genuineness. Overall therefore, he urged that the entire payment made to IDCC ought to be disallowed. Per contra, the Ld. AR for the assessee fully supported the order of the Ld. CIT(A).

39. We have heard both the parties and perused the findings of the lower authorities in light of the material available on record. It is noted that the impugned addition emanated from Page Nos. 3, 4, 20, 21, 7 & 6 of Bundle No. 3. All these six pages are noted to have been scanned and extracted by the AO in the assessment order. It is noted that Page Nos. 3 & 4 are the extracts of tally ledgers comprising of the details of payments made to IDCC. These ledgers are noted to be forming part of the books of accounts and it is not in dispute that all these payments were made through banking channels. Accordingly nothing adverse can be discerned from these Pages. Now we examine, Page Nos. 6 & 7 which led to the impugned addition. The said Pages are also noted to be an extract of ledger which contains date-wise entries of commission calculated at 5% payable to ECC (flagship company of the JV partner, Shri U.M. Rupchandani) on the payments made to IDCC. The AO is noted to have inferred that this document suggested commission payments to ECC for arranging invoices from IDCC.

40. Having perused these seized documents, we are in agreement with the findings of the Ld. CIT(A) that the inference drawn by the AO is based on surmise and conjecture. The entries in these pages nowhere suggested that IDCC was providing bogus bills or that in

lieu of the payments made to IDCC, cash was being returned to the assessee JV. The Ld. AR has explained that the rationale behind the calculation of 5% towards the payments made to IDCC. He pointed out that IDCC was an established and renowned contractor and that it was doing substantial business with one of the JV partners, ECC. On the other hand, the business of KIL, which was the majority JV partner in the assessee JV, was minimal with ECC. The Ld. AR accordingly explained that it was ECC, who had bought IDCC onboard and to whom certain tasks were sub-contracted. Since ECC was over all supervising and managing the tasks sub-contracted to IDCC, it was seeking separate commission @ 5% of the invoices billed/payments made to IDCC from the assessee JV, over and above the share of profit. Accordingly, ECC was tracking the payments made by the assessee JV and maintaining the said ledger found at Pages 6 & 7. Since the other JV partner i.e. KIL was not agreeable to such terms, it was never acted upon. This fact according to him was corroborated by the entries in these pages itself, which clearly showed that no corresponding receipt, either in cash or through bank, was ever recorded in the said ledger by ECC.

41. The Ld. AR has also rightly pointed out that the fact that these entries did not suggest commission for providing accommodation bills, was also corroborated by the noting found on Page Nos. 20 & 21. It is seen that, Pages Nos. 20 & 21, according to AO, represented actual state of affairs regarding the accounts of the assessee JV. If that be so, then, we agree with the submission of the Ld. AR, that corresponding cash entries i.e. the payments made to IDCC less 5%

commission, ought to have been recorded therein. However, no such noting or entry was found on this page, which lends credence to the explanation given by the Ld. AR that the noting found on Page Nos. 6 & 7 were dumb in nature and that it nowhere suggested payment of commission for arranging accommodation invoices from IDCC.

42. The Ld. AR also brought to our notice that, another related entity viz., M/s Eagle India Infra Limited had also paid contract expenses to IDCC, which also was covered under the same search action. The income tax assessment of M/s Eagle India Infra Limited is noted to have been completed by the same AO in which no adverse findings were recorded qua the payments made to IDCC and it was allowed in full. Having regard to this factual position, we find force in the Ld. AR's plea that when the same AO had accepted the payments made by M/s Eagle India Infra Limited to IDCC as genuine, then it was incorrect for him to take a completely contrary view in the case of the assessee JV.

43. We further note that, even the interpretation of the AO that the amount mentioned on Page No. 4 i.e. 2% less which corresponded to the amount paid back by ECC, suggested that the monies were being received back after deducting commission, is also found to be far from reality. Before the Ld. CIT(A), the appellant had explained that the entries mentioned in seized document Page No. 4 corresponded with the cheques issued by the assessee to IDCC and that the difference of 2% between the expenditure and payments was on account of TDS deducted u/s 194C of the Act. Overall therefore, we

find merit in the following findings of the Ld. CIT(A) holding that the AO's interpretation of these seized documents was incorrect.

> "i) In none of the papers mentioned above, there is any evidence or mention of receiving the amount back in cash by the appellant. It is a well settled legal principle that the seized documents should be interpreted in the manner they are written and in the absence of any further evidence, neither the assessee nor the assessing officer is permitted to add or take-out anything from the seized documents. In his analysis of these seized documents, the Assessing officer has not pinpointed any noting/entry substantiating that the amount of Rs.29,99,72,505/- paid to IDCC through cheque has been received back in cash by the appellant. Neither, the AO has brought any other evidence on record (other than his interpretation of seized papers) to substantiate his interpretation that the amount was actually received back by the appellant in cash.
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> ii) The Assessing Officer has interpreted that the amount mentioned in page no. 4 is 2% less than the amount mentioned in page no. 3 and this page no. 4 corresponds to amount paid back by ECC to the appellant. This page has been duly explained by the appellant as mentioned in para 55 of this order. The appellant has stated that the entries mentioned in seized page no. 4 are corresponding to cheques issued by the appellant to IDCC. The appellant has also informed that the difference of 2% between expenditure mentioned on page 3 and payment on page 4 is on account of TDS u/s 194C. The appellant has also given an entry-wise reconciliation of various entries on page 3 and page 4 vis-a-vis the ledger accounts of IDCC in its books of accounts. This table has already been reproduced in para 55 of this order and is not being repeated here. It has also been stated that ECC might be maintaining this ledger in order to track the payments because it was

supervising the work of IDCC and was negotiating extra remuneration on this. This submission of the appellant appears to be correct firstly because the title of page 4 is "IDCC CHQ" and secondly, because the payments details to IDCC after deducting TDS (as per ledger accounts of IDCC in the books of the appellant) matches with the details mentioned on seized page no. 4.

iii) The Assessing Officer has interpreted that after keeping 5% commission, ECC has deposited the amount back in IDCC cheque account. There is inconsistency in the interpretation by the Assessing Officer because at one side the Assessing Officer is saying that the commission @ 5% was paid to ECC but on the other hand Assessing Officer is saying that the amount deposited back in IDCC cheque account' is 2% lower of the payments made to IDCC. In any case, the contents of seized page no. 4 stand explained by appellant as discussed above.

iv) There is no noting or evidence on these seized pages regarding the cash received from IDCC similar to the case of 30 parties mentioned at seized page no. 18 and 19. In the case of these 30 parties, notings on page no. 19 indicate that amount in cash after reducing the commission was received back by the appellant for further utilisation. However, on the seized papers relied upon by the AO, there is no such noting regarding the payments made to IDCC.

V) The Assessing Officer has further relied on seized pages no. 20 & 21 interpreting these pages as 'actual state of affairs of accounts of both JV members with the appellant'. The Assessing officer has noted that on these pages, there is an entry of Rs. 5,00,00,000/- for cash investment by ECC indicating that the money paid by the appellant to IDCC has come back through ECC in IDCC CHQ account. I have perused the said seized pages no. 20 & 21. A perusal of these two

pages (page 20 &21) suggests that the pages do not have any entry for cash deposit corresponding to amount of Rs. 29,99,72,505/- less Rs. 1,49,95,000/-, as alleged by the AO. Neither, there is any entry corresponding to Rs. 25,47,02,040/- (as mentioned on seized page no. 4). Had the interpretation of the AO been correct, these pages (20 & 21) should have contained either of these two entries. Thus, even if, it is presumed that the interpretation of AO regarding page 20 & 21 that these are actual accounts of members of appellant JV, is correct, in that case also, there is no conclusive evidence that the amount paid to IDCC has come back to the appellant JV in cash through ECC."

44. We thus agree with the Ld.CIT(A) that the contents of the seized pages, relied upon by the AO, does not support his interpretation that the sub-contract expenses paid to IDCC had come back to the assessee through ECC in cash. Our findings is noted to be also supported by the contemporaneous evidences brought on record by the assessee as well as IDCC to substantiate the genuineness of the payments. As noted earlier, the assessee had appointed IDCC as a sub-contractor for a portion of their work in relation to the water pipeline project being executed at Ulhasnagar. Before the lower authorities as well as before us, the assessee is noted to have furnished the following evidence/documents to corroborate the genuineness of the transactions with IDCC.

- Registration Certificate with PWD Department.
- Work Certificate issued to IDCC.
- Ledger extracts in the books of the appellant.
- Copies of invoices.
- Proof of payment (Extracts of bank book as well as extracts of bank statements).
- Confirmation letter from IDCC.

- ITRs acknowledgement of. IDCC for AY 2012-13 to 2016-17 along with computation of Income.
- Copies of Tax Audit reports and Financial Statements for AY 2012-13 to 2016-17.
- Copies of Assessment orders u/s 143(3) in the case of IDCC for AY
- 2012-13, 2013-14 and 2014-15.
- Copies of Service Tax Returns filed by IDCC for AY 2013-14 to 2016-17.
- Copies of VAT Audit reports of IDCC for AY 2012-13 to 2016-17.

45. Having perused the above documents, we note that IDCC is a registered contractor with Class I-A grade with government departments. The said sub-contractor is noted to hold all relevant registrations to perform the tasks sub-contracted by the assessee. The assessee is noted to have provided the copies of invoices, proof of payments and confirmation letter from IDCC. The work certificate issued to IDCC was also placed before the lower authorities. It is noted that the AO had made independent enquiry u/s 133(6) of the Act from IDCC, which in their reply had *inter alia* also provided the ledger account of the assesse JV as appearing in their books, the expenses incurred towards execution of the works contract and the year-wise work completion certificate issued by the assessee. It is also noted that, IDCC had regularly filed their service tax returns and VAT Audit reports and that it had fully discharged its service tax and VAT liabilities levied on their invoices to the credit of the Government. Having perused the financials of IDCC, we note that it has reported substantial turnover in excess of several hundred crores in AYs 2013-14, 2014-15 & 2015-16 respectively. The audited financials reveal that IDCC is a fully functioning company engaged in rendering contractual services. The Ld. CIT(A) is also noted to

have taken cognizance of the income declared by IDCC across various assessment years at Para 79.5 of the appellate order, which showed that IDCC was declaring substantial income each year and therefore lacked the characteristics of a paper/shell entity as alleged by the AO. It is further noted that the AO was unable to find any defect in any of these documents. Even before us, the Revenue was unable to point out any specific infirmity in these evidences furnished by the assessee and IDCC, which demonstrated the genuineness of the payments made towards sub-contract charges.

46. We now come to the last contention of the Ld. DR which was that, IDCC was unable to provide the details of work performed and the details of specific expenses incurred for such work carried out for the assesse. In this regard, we find that the Ld. CIT(A) had rightly dealt with the same at Paras 79.9 and 79.10 of the appellate order, which is being extracted below:

> "79.9 In the remand report, the Assessing Officer has raised issues that IDCC did not file the copy of agreement with the appellant for undertaking sub-contracting work. In this regard, the appellant has submitted that there was no written agreement with IDCC for undertaking the sub-contract work. It has been argued that the expenses paid to IDCC for sub-contracting work cannot be held as bogus merely because there was no written agreement especially when M/s IDCC is an established sub-contractor and has included the amount paid by the appellant in its receipts. The appellant has also harped upon the fact that M/s IDCC has turnover ranging between Rs. 15 Crores to 38 Crores and has disclosed

substantial amount of taxable income for A.Y. 2012-13 to 2016-17. The appellant has further submitted that written agreements are no guarantee of making the transactions genuine because there may be cases where written agreements may be made to create evidence for showing a bogus transaction as genuine transaction. As per the appellant, while deciding the genuineness of a transaction, one has to see whole nature of documents and evidences submitted by the parties. I tend to agree with the appellant because IDCC and the appellant filed various documents in this regard and the AO has not find any fault in these documents. In my opinion, merely because there was no written agreement between the appellant and IDCC, the sub-contract expenses paid to IDCC cannot be termed as bogus especially when there is no conclusive evidence proving the bogus nature of these subcontract expenses.

79.10 Another argument mentioned by the Assessing Officer in the remand report is that M/s IDCC did not file the details of expenses incurred for the work carried for the appellant along with supporting evidences. In the rejoinder, the appellant has submitted that IDCC vide letter dated 18/12/2019 sent to the Assessing Officer in response to notice u/s 133(6) of the Act had clarified that the expenses incurred for execution of work for the appellant was debited to P/L Account along with expenses incurred for execution of other contracts. The appellant has contended that the Assessing Officer has not appreciated that no contractor maintains contract-wise books of accounts and the books of accounts give overall picture of expenses incurred on all the contracts being executed in that particular year and it is practically not

> possible to segregate the expenses for each contract. I find merits in the said submission of the appellant because there is no requirement to maintain separate books of accounts for each contract being executed by a contractor and therefore it may not be practically possible for a contractor to segregate expenses incurred for a particular contract, as desired by the AO in the present case. Here it is important to note that the assessment u/s 143(3) of the Act has been completed in the case of IDCC for AY 2012-13, 2013-14 and 2014-15 wherein the books of accounts of IDCC were accepted by its Assessing Officer. Therefore, in my opinion, there is no reason to doubt the books of accounts of IDCC."

47. Before us, the Ld. DR was unable to dislodge the above findings and therefore this contention is also held to be unsustainable. Hence, considering the totality of the facts as discussed in the foregoing, we hold that the payments made to IDCC was genuine and the AO is held to be unjustified for disallowing the same. Hence, this ground of the Revenue is dismissed.

48. In the result, the appeal of the assessee in ITA No.3022/Mum/2023 is partly allowed and the appeal of the Revenue in ITA No.3061/Mum/2023 stands dismissed.

49. We now take up the appeals of the assessee and the Revenue in ITA Nos. 3023/Mum/2023 & 3060/Mum/2023 for AY 2015-16.

50. Ground Nos. 1, 2 and 4 of the Revenue's appeal and all the grounds taken by the assessee in their appeal relates to the addition of Rs.16,18,42,702/- made by the Assessing Officer in AY 2015-16

out of bogus purchases of Rs.37,95,26,087/- made from thirty (30) vendors. After considering the rival submissions, it is observed that the issue involved in this ground is similar to the Ground Nos. 1, 2 and 4 of the Revenue's appeal and the assessee's appeal for A.Y. 2014-15. Following our conclusion drawn supra for A.Y. 2014-15, in the overall facts and circumstance of the case, we hold that it is only the profit element embedded in these bogus payments which need to be brought to tax. As held above, on the given facts of the case, the AO is directed to assess the profits of the assessee at 8% of the contract receipts. With these directions, the AO is directed to re-compute the total assessable income for the relevant AY 2015-16, in the like manner as directed in AY 2014-15. Hence, Ground Nos. 1, 2 and 4 of Revenue's appeal stands dismissed and the grounds of appeal taken by the assessee are partly allowed.

51. Ground No. 3 of the Revenue's appeal relates to the Ld. CIT(A)'s action of deleting the disallowance made by the AO on account of sub-contract charges paid to IDCC. After considering the rival submissions, it is observed that the issue involved in this ground is similar to the Ground No. 3 of Revenue's appeal in A.Y. 2014-15. Following our conclusion drawn in A.Y. 2014-15, we dismiss this ground of the Revenue.

52. We now take up the appeals of the assessee and the Revenue in ITA Nos. 3024/Mum/2023 & 3059/Mum/2023 for AY 2017-18. The common issue involved in both these appeals relate to the **protective addition** of Rs.8,00,00,000/- made by the AO on account

of unexplained cash credit in the hands of the assessee JV. The facts relating to this protective addition are that, the AO had found that there were two noting's on Page Nos. 20 & 21 under the nomenclature 'INVT in Cash' in the names of the JV partners, KIL and Shri U.M. Rupchandani of Rs.3,00,00,000/- and Rs.5,00,00,000/- each. According to the AO, these pages contained the noting's regarding the actual state of affairs relating to the assessee JV. The AO inferred that these cash investments denoted the cash infused by the JV partners into the assessee JV to undertake the water pipeline project. Since the date on these pages was 25.08.2016, the AO presumed that the cash investments were made on this date and accordingly added these sums in the hands of the JV partners in AY 2017-18 by way of unexplained investment and correspondingly made protective addition in the hands of the assessee JV also by way of unexplained cash credit in AY 2017-18.

53. Aggrieved by this action of the AO, the assessee preferred an appeal before the Ld. CIT(A). Having regard to the cumulative facts of the case, the Ld. CIT(A) noted that, the assessee JV had already declared additional income of Rs.9.50 crores viz., Rs. 5 crores in relation to ECC and Rs.4.50 crores in relation to KIL in AYs 2011-12 to 2013-14. The Ld. CIT(A) further noted that additional sum of Rs.3,36,55,357/- had also been offered by way of additional income across AYs 2014-15 to 2016-17. Applying the principle of telescoping, the Ld. CIT(A) held that such additional income assessed in earlier years could be telescoped against the cash investment of Rs.8 crores unearthed in Page Nos. 20 & 21 relating to

AY 2017-18. The Ld. CIT(A) accordingly held that, no separate addition on account of cash investment was warranted since it was fully covered by additional income offered in earlier years. Being aggrieved by the above appellate order of the Ld. CIT(A), both the parties are in appeal before us.

54. Heard both the parties. Before adverting to the facts of the case, we first take note of the principle of telescoping which has since been judicially approved by the Hon'ble Supreme Court in the case of **Anantharam Veerasinghaiah & Co. Vs CIT (123 ITR 457)**. In the decided case, it was held that where the assessee offers any income on *ad hoc* basis, then such income is commonly described as intangible addition; but it is very much a part of assessee's real income as disclosed in his account books and has the same concrete existence. The Hon'ble Court held that the secret profits or undisclosed income of an assessee earned in the same or an earlier assessment year may constitute a secret fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. The intangible additions were held to be available to the assessee as the regular book profits could be. The Apex Court thus held when the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or by reference to concealed income earned in that very year then no addition is warranted on account of such cash deficits or cash credits.

55. Similar view was expressed by Hon'ble Madras High Court in the case of **CIT v. K. S. M Guruswamy Nadar and Sons, [1984] 149 ITR 127**. In the decided case, it was held that when there are two separate additions viz., one on account of suppression of profit and another on account of cash credit, then it is open to the assessee to explain that, the suppressed profits had been brought in as cash credits and has to be telescoped into the other.

56. Gainful reference may also be made to the decision of the Hon'ble jurisdictional Bombay High Court in the case of **CIT vs J.J. Gandhi (39 CTR 127)**. In this judgment also, the Hon'ble High Court had approved the theory of telescoping and held that it could be applied in cases where additions in relation of unexplained money/investment are sought to be made in the hands of the assessee. The Hon'ble Court explained that if an addition towards undisclosed income was made and the AO also seeks to make certain addition in relation to unexplained investment then, it can be treated by the assessee that the unexplained investment is sourced out of the undisclosed income already taxed.

57. The principle which emerges from the above is that, the same income should not be taxed twice i.e. once at the time of generation and thereafter at the time of application for routing back into the business. The said principle would equally apply where the cash generated by business concerns are routed through partners/directors. Having regard to this settled legal position, we now come back to the facts of the case. It is not in dispute that the assessee had declared

additional income of Rs.9,50,56,072/- before the ITSC, Mumbai in AY 2013-14. It is noted that the assessee had also filed a letter dated 28.10.2014 before the ITSC wherein it was specifically clarified that this income was utilized by way of investment in the on-going work of water pipeline project at Ulhasnagar. The details of utilization *inter alia* comprised of sum of Rs.4,50,56,072/- and Rs.5,00,00,000/- by KIL and Eagle Infra Limited, represented by Shri U.M. Rupchandani, respectively. It is therefore evident that the JV partners had disclosed income in the hands of the assessee JV before the ITSC, Mumbai and such additional income of Rs.9,50,56,072/- represented the intangible addition / secret profit, which applying the judicially approved principle of telescoping, could be set off against any unexplained money/investment found by the Revenue.

58. The Ld. CIT(A) is noted to have rightly observed that the AO had erred in considering the cash investment aggregating to Rs.8,00,00,000/- to have been made in AY 2017-18 only because these pages were dated 25.08.2016. The Ld. CIT(A) had rightly analyzed the contents of the seized pages and inferred that the entries therein do not suggest that these transactions were undertaken only in FY 2016-17. Instead, the noting's as well as the surrounding circumstances relating to the water pipeline project suggests that the said investment would have been made by the JV partners earlier viz., when the project was ongoing and most likely in 2015 when the major work was completed.

59. However, irrespective whether the investment was made in 2015 or in FY 2016-17, the admitted facts show that the assessee JV had disclosed income of Rs.9,50,56,072/- in AY 2013-14 and had specifically declared the same to be the sum available for investment by the JV partners towards the water pipeline project. Further, the assessee JV had also declared additional income aggregating to Rs. 3,36,55,357/- in AYs 2014-15 to 2016-17, which was also available to be set off against any unexplained money/ investment of Rs.8,00,00,000/- added by the AO in AY 2017-18. On these facts, we thus uphold the Ld. CIT(A)'s action of allowing the telescoping benefit and set-off of the amount of undisclosed income aggregating to Rs.12,87,11,429/- (Rs. 9,50,56,072 + Rs.3,36,55,357), towards the cash investment of Rs.8,00,00,000/- found mentioned on seized pages 20 & 21. Hence, having regard to the judicially approved principle of telescoping, according to us, since the additional income offered to tax in earlier years was sufficient to cover such cash investment alleged to have been made by JV partners, no separate protective addition was required to be made in the hands of assessee JV. Accordingly, the appeal of the Revenue is dismissed.

60. In light of our above findings, the grounds raised in in the assessee's appeal have also been rendered infructuous and thus the assessee's appeal also stands dismissed.

61. In the result, all the appeals of the Revenue are dismissed and the appeals of the assessee for AY 2013-14 is allowed, for AYs

2014-15 & 2015-16 is partly allowed and the appeal for AY 2017-18 is dismissed.

Order pronounced in the open court on this 27/02/2024.

Sd/-	**Sd/-**
(BR BASKARAN)	**(ABY T. VARKEY)**
(ACCOUNTANT MEMBER)	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 27/02/2024.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**