

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |  
IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER  
&  
SHRI RAJ KUMAR CHAUHAN, HON'BLE JUDICIAL MEMBER

**I.T.A. No. 4557/Mum/2024**  
**Assessment Year: 2016-17**

<b>DCIT(CC)-8(3), Mumbai</b>	Vs	<b>Afcons Infrastructure Limited</b> Afcons House 16, Shah Industrial Estate Veer Desai Road Andheri West Mumbai - 400053 <b>[PAN: AAACA9067G]</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>

Assessee by :	Shri Madhur Agarwal & Shri Mayur Kisnadwala, A/Rs
Revenue by :	Dr. K.R. Subhash, CIT D/R

सुनवाई की तारीख/Date of Hearing : 10/10/2024

घोषणा की तारीख /Date of Pronouncement: 16/10/2024

**आदेश/ORDER**

**PER NARENDRA KUMAR BILLAIYA, AM:**

This appeal by the revenue is preferred against the order passed by Id. CIT(A)-50, Mumbai, dated 12/07/2024 pertaining to AY 2016-17.

2. The grievance of the revenue reads as under:-

1. "Whether in the facts and circumstances of the case and in law the Ld. CIT(A) justified in restricting the addition of Rs. 1,67,82,586/- to only 15% instead of 100% on account of accommodation entries?"

2. "Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is justified in allowing the relief to the assessee ignoring the judgment of Hon'ble Apex court in the case of N.K. Proteins Limited on this issue wherein, the SLP filed by the assessee has been dismissed by Hon'ble Apex Court?"

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the decision of CIT(A) in respect of addition on account of accommodation entries after noting that assessee failed to negate the information based on enquiry conducted by DDIT(Inu.), Unit-4(3), Mumbai that they were non-genuine dealers and providing bogus accommodation entries?"

4. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the burden of proof cast on the assessee was of a very high degree and assessee failed to discharge this burden?"*

5. *"Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is justified in holding that there is no documentary evidence to substantiate the allegation of the AO regarding payment of 1% commission expenses to the subcontractors and estimated the commission payment on the basis of assumptions?"*

6. *"Whether in the facts and circumstances of the case and in law the Ld. CIT(A) justified in considering the claim of additional deduction u/s 80-IA without appreciating the fact that the claim of the assessee is not allowable in view of the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. Vs. CIT 284 ITR 23 (SC) [2006] as the claim of deduction was not made in the original return of income filed by the assessee?"*

7. *"Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that the provisions of section 14A is not applicable where the assessee has no exempt income during the year and failing to appreciate that the provisions of section 14A clearly stipulates that expenditure incurred in relation to income "not includible in total income" has to be considered for computing the disallowance u/s 14A?"*

8. *"Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was right in holding that the provisions of section 14A is not applicable when there is no exempt income earned by the assessee during the year failing to appreciate the clarification in Board's Circular No. 05/2014 dated 11.02.2014 wherein it is clearly laid down that expenses which are relatable to earning of exempt income have to be considered for disallowance irrespective of the fact whether any such income has been earned during the Financial Year or not?"*

9. *Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that the provisions of section 14A is not applicable when there is no exempt income earned by the assessee during the year, whereas in Finance Act 2022, explanation to section to 14A has been inserted which provides that of the applicability of the said section even in the absence of exempt income, which being clarificatory in nature has retrospective effect?"*

10. *"Whether in the facts and circumstances of the case and in law the Ld. CIT(A) justified in restricting the disallowance u/s 14A to Rs. 13,69,000/- without appreciating the fact that the revised working of disallowance of Rs. 68,14,000/-u/s 14A of the assessee made during the scrutiny assessment?"*

11. *Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in deleting the addition made by the Assessing Officer u/s 14A of the Act for the purpose of computing Book Profit u/s 115JB of the Act."*

3. Having heard the rival contentions, we have carefully perused the orders of the authorities below.

4. Ground Nos. 1 to 5 relate to the restriction of the addition to only 15% instead of 100% on account of alleged accommodation entries.

5. Briefly stated the underlying facts in the impugned issue are that the assessee is engaged in the business of civil construction and infrastructure development. During the course of scrutiny assessment proceedings, on perusal of ITS details, the assessee was asked to furnish details in respect of transactions with Shri Arvind Kumar Goel, proprietor of M/s Kumar Enterprises, during the year under consideration. The requisite details were furnished by the assessee and on perusal of the same, the AO noticed that the assessee has made payment of Rs. 11,18,83,910/- on account of job work. As per the information received from the investigation authorities, the AO came to know that Shri Arvind Kumar Goel and its concern M/s Kumar Enterprises are accommodation entry providers without actually indulging in supply of items/work. Assessee was asked to prove the genuineness of the transactions and was showcaused as to why the expenditure should not be treated as bogus. The assessee filed a detailed summary of payments, copies of ledger accounts, copies of bills, work order and copy of TDS certificates to prove the genuineness of the

transactions in question. It was explained by the assessee that it is engaged in the execution of all large and complex civil projects in India as well as abroad and it sub-contracted, part of the main contract to other sub-contractors in order to ensure timely completion of the contract. It was further explained that M/s. Kumar Enterprises, was one such subcontractor whose services were availed by the assessee by subcontracting part of its ongoing project for the assessment year under consideration.

5.1. To verify the documents furnished by the assessee, notices u/s 133(6) of the Act, were served upon the parties at the addresses provided by the assessee. However, the notices were returned by the postal authorities unserved. The AO was not convinced with the genuineness of payment of Rs. 11,18,83,910/- purported to have been paid to M/s. Kumar Enterprises and drawing support from various judicial decisions discussed in the body of the assessment order, the AO made the addition of Rs. 11,18,83,910/-.

5.2. The said addition was challenged by the assessee before the Id. CIT(A) and it was strongly contended that for the execution of large and complex civil engineering projects in India and abroad, the assessee engaged subcontractors as part of the main contract work to ensure the timely completion of the contract work and M/s. Kumar Enterprises was one of such subcontractors whose services were availed by the assessee by subcontracting a part of its ongoing project for the assessment year under consideration. It was explained that the assessee

had availed services of M/s. Kumar Enterprises for a number of projects and accordingly the subcontracting charges were paid for the services rendered by them. After considering the facts and the submissions, the Id. CIT(A) was of the opinion that there is no denial of the fact that services have been performed by the subcontractor. According to the Id. CIT(A), the AO has not been able to prove that the subcontractor has not performed the services. Once again copies of work orders, bills raised, bills finalized, copies of completion certificate, copies of ledger account and bank statements were furnished and after carefully perusing the factual details furnished by the assessee, the Id. CIT(A) was convinced that the assessee has issued work orders for specific work to be carried out by M/s. Kumar Enterprises against which, the bills were raised and payments have been made by the assessee through banking channels after deducting TDS. Having been convinced by the documentary evidences, Id. CIT(A) found that in the earlier AY 2010-11, the AO himself has restricted the disallowance to 12.5% of subcontractor charges. Taking a leaf out of the earlier AY, the Id. CIT(A) restricted the addition to 15% of the total payments made to M/s. Kumar Enterprises.

6. Before us, the Id. D/R strongly supported the findings of the AO. Per contra the Id. Counsel for the assessee drew our attention to the decision of the Co-ordinate Bench for AY 2011-12 wherein on identical set of facts, the Co-ordinate Bench has restricted the disallowance to 15% of the total payments.

7. We have carefully perused the orders of the authorities below and have considered the decisions of the Co-ordinate Bench (*supra*). We find force in the contention of the Id. Counsel for the assessee. The Co-ordinate Bench in *ITA No. 1152/Mum/2024 and 1153/Mum/2024; AY 2011-12*, had the occasion to consider an identical issue on identical set of facts and held as under:-

*"9. We have considered the rival submissions and perused the material on record in relation to grounds of appeal raised by the Revenue. The primary grievance of the Revenue is that the CIT(A) has reduced the amount of disallowance from 100% of payments made to the sub-contractors to 15% of such payments. According to the Revenue the disallowance made in the hands of the appellant should be restored to 100% of the payments made to sub-contractors. In this regard, it would be pertinent to refer to the following findings returned by the CIT(A) while granting partial relief to the Assessee:*

*"11. The appellant is in the business of involved in the execution of large and complex civil engineering projects in India as well as abroad. For the purpose of carrying out work, the appellant had engaged several sub contractors. There is no dispute on the fact that, the projects for which the sub-contractors were deployed have been completed and handed over to the clients who were various Government and semi-Government authorities. It was not possible for the appellant to carry out such contract work without engaging sub contractors to carry out the same. It is also not a matter of dispute that the income earned from such activities has been offered for tax. At the same time, it is also observed that these contractors were not traceable on the address provided by the appellant. In the said facts of the case, the entire subcontract payment made to these two subcontractors cannot be disallowed. In the identical set of facts, the Honble ITAT Ahmedabad as discussed above, in case of Ultratech Transmission (P) Ltd, relying on various decision, has restricted the disallowance to 10%. In the Appellant's own case for the A.Y 2010-11, on the same facts, the A.O, disallowed 12.5% of subcontract charges.*

*In the backdrop of these facts, in my opinion to cover up the discrepancies, disallowance to be restricted to 15 % of the total payments made to the two sub-contractors. Accordingly the ground no 4 is PARTLY ALLOWED" (Emphasis Supplied)*

*9.1. In our view, the Revenue has failed to dislodge the factual findings returned by the CIT(A) during the appellate proceedings before us. We find merit in the contention advance on the behalf of the Appellant that the Assessing Officer has failed to bring any material on record to establish that the work was not actually performed and therefore, disallowance of 100% payments made to sub-contractors is not warranted in the facts and circumstances of the present case. In this regard it*

would be relevant to refer to paragraph 6.5.(n) of the reassessment order, dated 31/12/2018 wherein the Assessing Officer has recorded as under:

*"It is interesting to note that the assessee has sub-contracted its work to M/s Kumar Enterprises and M/s Shivam Enterprises which is alleged bogus entry provider therefore if the work has been completed by the assessee company it is not a certain as to how and from whom the work was completed. The completion of work itself prove that the assessee has got were completed either on its own or from some other agencies whose sources of payments have not been disclosed. The above inference are drawn after considering the fact that M/s Kumar Enterprises and M/s Shivam Enterprises are shell companies engaged in providing accommodation entry only. Therefore, ....." (Emphasis Supplied)*

9.2. Further, nothing has been brought on record by the Assessing Officer to challenge the veracity of the documents (including completion certificates) placed on record by the Assessee. The CIT(A) has taken into consideration the fact that the notices issued under [Section 133\(6\)](#) of the Act to the two parties could not be served at the office address provided by the Appellant while restricting the disallowance to 15% of payments made to sub-contractors. There is nothing on record to support that the contention advanced by the Revenue that 100% of payments made to sub-contractors should be disallowed. In our view, the CIT(A) has rightly restricted the disallowance to 15% of payments made to sub-contractors by taking into consideration the assessment order passed in the case of the Assessee for the Assessment Year 2010-2011 wherein the Assessing Officer had, in similar facts and circumstances, disallowed 12.5% of payments made to sub-contractors. During the course of hearing, it was pointed out by the Learned Department Representative that the Revenue had not accepted the aforesaid assessment order for the Assessment Year 2010-2011 and revision proceedings under [Section 263](#) of the Act were initiated. In this regard, it was clarified by the Learned Authorized Representative for the Appellant that the Revenue had sought to revise the aforesaid assessment order under [section 263](#) of the Act, however, the revision order passed under [section 263](#) of the act was set aside by the Tribunal on the ground that the view taken by the Assessing Officer was a plausible view. Thus, the assessment order for the Assessment Year 2010-2011 on which reliance was placed by the CIT(A) stands restored.

10. In view of the above and taking into account the facts and circumstances of the present case, we are not inclined to interfere with the order passed by CIT(A) restricting the disallowance to 15% of payments made to sub-contractors. There is nothing on record to persuade us to take a view that disallowance at a higher rate was warranted in the facts and circumstances of the present case. We have already rejected the contention of the Revenue to restore the disallowance at the rate of 100% of payments made to sub-contractors. We also concur with the CIT(A) that in absence of any material to substantiate the allegation that Assessee had paid commission at the rate of 1%, the addition made in respect of commission expenses of INR 8,81,3000/- cannot be sustained merely on assumptions and guess work. Accordingly, Ground No. 1 to 5 raised by the Revenue in the appeal are dismissed. Since we have dismissed the Appeal of the Revenue, the cross objections raised by the

*Assessee are dismissed as not pressed in view of instructions received by the Learned Authorized Representative. Accordingly, the appeal of the Revenue and the Cross Objections by the Assessee are dismissed."*

8. As no distinguishing decision has been brought to our notice, respectfully following the decision of the Co-ordinate Bench, Ground Nos. 1 to 5 raised by the revenue are dismissed.

9. Ground No. 6 relates to the claim of additional deduction u/s 80-IA of the Act.

10. On perusal of the orders of the authorities below we find that the AO has denied the claim of deduction u/s 80-IA of the Act because the said claim was not made in the original return of income and, therefore, drawing support from the decision of the Hon'ble Supreme Court in the case of *Goetze India Ltd. Vs. CIT 284 ITR 23 (SC) [2006]*, the claim of deduction was denied.

11. During the course of the appellate proceedings, the claim was reiterated and the Id. CIT(A) called for a remand report from the AO who in his remand report fairly conceded that the claim of deduction has been allowed in all subsequent assessment years. Therefore, the Id. CIT(A) also allowed the claim of deduction u/s 80-IA of the Act.

12. After giving a thoughtful consideration to the findings of the Id. CIT(A), we could not find any reason to interfere with the findings. Ground No. 6 is accordingly dismissed.

13. Ground Nos. 7 to 11 relate to restriction of disallowance u/s 14A of the Act to Rs. 13,69,000/-.

14. During the course of scrutiny assessment proceedings, the AO found that the assessee had earned dividend income of Rs. 1,62,00,250/- from investment made in equity shares which has been claimed as exempt under section 10(34) of the Act. The AO noticed that the assessee had earned dividend of Rs.1,62,00,000/- from investments in shares of Tata Consultancy Services (TCS) and Rs.250/- from investments in shares of Simplex Infrastructures Ltd.. The AO also noticed that the assessee has *suo moto* disallowed Rs 13,69,000/- u/s 14A of the Act being 1% of the average investment as on 31/03/2016. Invoking the provisions of Section 14A r.w.r. 8D, the AO computed the disallowance at Rs.68,17,000/-and after deducting *suo moto* disallowance of Rs.13,69,000/-, the AO made the addition of Rs.54,48,000/-.

15. The disallowance was challenged before the Id. CIT(A) on the ground that the assessee had invested in shares of TCS from its own funds being interest free funds received from Shapoorji Pallonji and Company Ltd. Therefore, there is no question of any disallowance of interest and the *suo moto* disallowance should suffice.

15.1. The Id. CIT(A) found that the assessee had borrowed interest free funds of Rs.100 Crores from Shapoorji Pallonji and Company Ltd., and purchased shares of TCS amounting to Rs. Rs.85,72,61,378/-, therefore, no borrowed capital was utilised for purchasing the shares and since the *suo moto* disallowance was sufficient, the Id. CIT(A) deleted the impugned additions.

16. Before us, the Id. D/R strongly placed reliance on the findings of the AO. Per contra the Id. Counsel for the assessee reiterated what has been stated before the lower authorities.

17. The undisputed fact is that the assessee borrowed funds from Shapoorji Pallonji and Company Ltd., and it is also not in dispute that the said borrowings were interest free and the shares were purchased out of such interest free borrowings. Therefore, we do not find any merit in the addition on account of interest payment. Insofar as, administrative expenses are concerned, the AO has disallowed 0.5% but the assessee has disallowed a higher amount of 1% at Rs.13,69,000/- which is more than the disallowance computed by the AO. We, therefore, do not find any reason to interfere with the findings of the Id. CIT(A). Accordingly, Ground Nos. 7 to 11 are dismissed.

18. In the result, appeal of the revenue is dismissed.

**Order pronounced in the Court on 16<sup>th</sup> October, 2024 at Mumbai.**

*Sd/-*  
(RAJ KUMAR CHAUHAN)  
JUDICIAL MEMBER

*Sd/-*  
(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, Dated 16/10/2024

*SC S.P.*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,  
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Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Mumbai