

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

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

**I.T.A. No. 4556/Mum/2024**

**Assessment Year: 2016-17**

**I.T.A. No. 4566/Mum/2024**

**Assessment Year: 2017-18**

**I.T.A. No. 4563/Mum/2024**

**Assessment Year: 2018-19**

**I.T.A. No. 4558/Mum/2024**

**Assessment Year: 2022-23**

<b>ITD CEMINDIA JV</b> 9 <sup>th</sup> Floor, Prima Bay Tower-B, Gate No. 5 Saki Vihar Road Powai Mumbai - 400072 <b>[PAN: AAAAI1305D]</b>	Vs	<b>The Deputy Commissioner of Income-tax, Central Circle 5(1), Mumbai</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>

Assessee by :	Shri Vijay Mehta a/w Shri Jignesh Shah, Shri Rupesh Sakpal, Ms. Monika Nemani, A/Rs
Revenue by :	Shri Krishna Kumar, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 16/10/2024

घोषणा की तारीख /Date of Pronouncement: 22/10/2024

**आदेश/ORDER**

**PER NARENDRA KUMAR BILLAIYA, AM:**

I.T.A. No. 4556/Mum/2024, I.T.A. No. 4566/Mum/2024, I.T.A. No. 4563/Mum/2024 & I.T.A. No. 4558/Mum/2024 are four separate appeals by the assessee preferred against four separate orders of the Id. Commissioner of Income Tax (Appeals) - 53, Mumbai, dated 26/07/2024, pertaining to AYs 2016-17, 2017-18, 2018-19 & 2022-23.

2. Since common issues are involved in the captioned appeals, they were heard together and are disposed off by this common order for the sake of convenience and brevity.

3. Since the underlying facts in the impugned issues are identical, at the concession of rival representatives, we have considered the facts for AY 2016-17 in ITA No. 4556/Mum/2024.

4. Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidence brought to our notice duly considered in light of Rule 18(6) of the ITAT Rules, 1963.

5. Briefly stated the facts of the case are that the assessee is an AOP (Association of Persons) being a joint venture between ITD Cementation India Ltd., and Indian company and Italian Thai Development Public Company Limited, a foreign enterprise, and is engaged in the business of infrastructure development to undertake projects of construction of roads, bridges, metro railway contracts, water supply project on contract basis from Government/non-government entities. The joint venture has entered into contracts of water supply projects for Kolkata Municipal Corporation and earned contract revenue from these projects.

6. A survey action u/s 133A of the Act was carried out in ITD Cem group and related entities on 26/10/2021. During the course of survey operation it is found that the assessee is following a unique method of accounting and the same is followed by the assessee group entities to

record unaccounted cash expenses which is deployed to secure work contracts from the contractee organizations. It was noticed that the assessee prepares Cost to Completion (CTC) reports which provide pen picture of the actual cost incurred for the project under each expense head - both Estimated costs and also the actual costs. The AO was of the opinion that the evidence found in a survey discovered the term "Contingency" used to denote those expenses which are not recorded in the books of account and are spent in cash for non-business purposes. On this presumption, the AO alleged that the assessee has incurred certain unaccounted expense in cash that is bogus expenditure and such cash have been generated by debiting fictitious expenditure in the ledger account/books of accounts. The AO further presumed that the contingency expenses shown in the CTC reports are adjusted in various costing heads of the books of accounts by passing "adjustment entries" which are 1) booking of artificial expenditure from shell entities and 2) booking of over-invoiced expenditure from regular vendors. The AO further alleged that the assessee has booked various bogus expenses in order to generate cash for meeting 'contingency' expenses.

6.1. The AO rubbished the contention of the assessee that the entire contingency expenditure is accounted in the books of accounts, though the AO categorically admitted that the total cost figure in the CTC report matches the total cost figure in the books of accounts, the cost booked under each head is different in the CTC report and the books of accounts.

7. The basis for not accepting the contention of the assessee by the AO is at page 31 of the assessment order, which is extracted for ready reference:-

*“10. The submission filed by the assessee has been considered, but not found acceptable on the following grounds:*

*i. The assessee has not followed the SOP for issuing PO/WO in various entities, which was followed in issuing PO/WO in other expenses. The assessee has submitted that SOP has not been followed in some instances before issuing PO/WO due to exigencies of work. The reason given by assessee is not acceptable because SOP has been followed in other cases other than these bogus transactions. Also, assessee failed to provide any reason for such exigencies to divert the regular procedure followed to issue the PO/WO. Further, it is noticed that the amount involved is very high and in standard practice expenditure and exigencies get proper approval from concerned authorities. The assessee failed to submit any documentary evidence to support the claim of assessee that SOP has been diverted in issuing PO/WO for the above referred expenses due to exigencies like nature of exigencies, prior or post approval for such exigencies, any standard practice followed for expenses due to exigencies.*

*ii. The assessee shown its inability to produce vendor wise list for contingency expenses.*

*iii. The assessee shown its inability to provide books of account wherein contingency expenses has been maintained.*

*iv. The assessee shown its inability to provide break up of liaisoning expenses. and contingency expenses.*

*v. The assessee has failed to submit the delivery challan/stock register/e-way bill/labour register of parties to whom notices u/s 133(6) were issued.*

*11. In view of the above, it is found that the assessee has followed SOP for issuing WO/PO and the same is considered as sacred for the organization, which was not followed before issuing WO/PO in some of the cases. Also, the assessee has failed to submit vendorwise list of contingency expenses, books of account where contingency expenses were maintained and breakup of contingency expenses and liaising expenses. As the assessee has failed to prove the genuineness of its claim towards contingency expenses amounting to Rs. 1,18,00,000/-, the same is hereby disallowed and added to the total income of the assessee. Penalty proceedings u/s 271(1)(c) is initiated separately for concealment of income.”*

7.1. Similar view has been taken in the captioned appeals during the assessment proceedings, though the quantum may differ.

8. The additions were challenged before the Id. CIT(A) and the Id. CIT(A) after considering the facts and submissions, held as under:-

*"14.22. In view of the above, I am unable to agree with the contention of the appellant that the entire expenses recorded in the books of account are genuine and that they do not include any part of expenses which are not allowable u/s 37(1) of the Act. There are more than enough evidences to prove otherwise. At the same time, it is seen that the persons concerned have repeatedly emphasized in the respective statement that such expenses form a small portion of the expense. The few evidences cited above do not warrant 100% disallowance of contingency expenses. In I.T.T.A.No.21 of 2013 dated 23.07.2013 in the case of CIT vs Sri Kamlekar Shankar Lal, the Hon'ble AP HC held that "The rate of estimation of profit is always discretionary. On consideration of the fact, sometimes the profit is estimated at 5% and sometimes it is estimated at 3%. It depends upon the appreciation of each and every fact of every individual case." It was further held that Court should not interfere with such discretion, unless the exercise of discretion was absolutely arbitrary. Thus, the estimation of profits or disallowance depends on facts and circumstances of each of the case.*

*14.23. In view of the above discussion, I am unable to agree with the stand of the AO that the entire expenses are to be disallowed. At the same time, there is no merit in the claim of the appellant that all the expenses are genuine. While some of them could still pass the test of business expediency, it is obvious that few others would not fulfill the conditions laid down in S. 37(1) of the Act. The extent of disallowance would depend on the nature and quantum of evidences in each case. Considering the facts of the case, I am of the view that the disallowance of 2.5% would suffice. During the year, the AO has disallowed a sum of Rs. 1,18,00,000/- on account of contingency expenses. The same is restricted to Rs. 2,95,000/-. The appellant gets a relief of Rs. 1,15,05,000/-. The disallowance is made u/s 37(1) of the Act."*

9. We have given a thoughtful consideration to the order of the authorities below. Let us first understand the basis of CTC. As mentioned elsewhere, the assessee is into infrastructure development extensively engaged in construction work across the country with ongoing projects across the country. As it happens in this line of business, the business-man makes a budgeted figure of project cost and

after few months of execution of the work, the budgeted figures are revised. As it always happens, the actual expenditure is always higher than the budgeted figure and the actual expenditure is recorded in the books of accounts. There is no dispute that the total expenditure recorded in the CTC is reported as accounted expenditure.

10. The entire addition revolves around the contingency expenditure recorded in the CTC report. As mentioned above, the contingency expenditure is mentioned at the time of preparation of the budget but when the actual figures are known, the same are recorded in the books of accounts. Therefore, it cannot be said that that the contingency figure are not recorded in the books of accounts. In fact, the AO himself admitted this fact at para 4 of his order where he has categorically accepted that the total cost figure in the CTC report matches the total cost figure of the books of accounts.

11. Since the figure of contingency has been recorded against the figure of total expenditure incurred, it is illogical to assume that the assessee has booked bogus expenditure and generated cash outflow from it. Moreover, the impounded material shows the expenditure on mercantile basis and no cash expenditure, therefore, the presumption of the AO that the assessee has generated cash out of bogus expenditure, is without any basis.

12. It is pertinent to refer to the provisions of Section 132(4A) of the Act relevant for search and seizure cases, which reads as under:-

*[(4-A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-*

*(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*

*(ii) that the contents of such books of account and other documents are true; and*

*(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.]”*

13. Thus, the presumption is only in search cases where it is presumed that the contents of such books of account and other documents are true whereas, the appeals under consideration are cases of survey operations where there is no such scope of presumption. This means that in the cases of survey operations, the onus is on the revenue to bring the cogent material evidence on record to show that the assessee has incurred expenditure which are not recorded in the books of accounts. As mentioned elsewhere, in the appeals under consideration, all the expenditure has been found to be recorded in the books of accounts and no error or infirmity has been pointed out by the AO nor by the Id. CIT(A). Even the books of accounts have been accepted and no defect has been pointed out.

14. The allegation that the assessee has not followed the Standard Operating Procedure (SOP) is not relevant as long as the impugned

expenditure are found recorded in the regular books of account maintained by the assessee.

15. Though the ld. First Appellate Authority has admitted that the entire expenses cannot be disallowed yet, he himself went on to estimate the disallowance which is again not a proper procedure. Once the expenses have been found to be fully recorded in the books of accounts, the same cannot be disallowed only on the whims and surmises of the revenue authorities.

16. Considering in totality the facts of the case in hand in light of the documentary evidence referred during the course of proceedings, we do not find any merit in the impugned additions. We direct the AO to delete the additions from the captioned appeals.

17. Other issues in the captioned appeals have not been pressed, therefore, the same are dismissed as not pressed.

18. In the result, the captioned appeals by the assessee are partly allowed.

**Order pronounced in the Court on 22<sup>nd</sup> October, 2024 at Mumbai.**

*Sd/-*

(RAJ KUMAR CHAUHAN)  
JUDICIAL MEMBER

*Sd/-*

(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, Dated 22/10/2024

*\*SC S.P.*



*I.T.A. No. 4556/Mum/2024*

*I.T.A. No. 4566/Mum/2024*

*I.T.A. No. 4563/Mum/2024*

*I.T.A. No. 4558/Mum/2024*

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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,  
TRUE COPY

Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Mumbai