

**IN THE INCOME TAX APPELLATE TRIBUNAL “H”, BENCH
MUMBAI**

**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAMLAL NEGI, JUDICIAL MEMBER**

**ITA No.1381/Mum/2018
(Assessment Year: 2009-10)**

ACIT, Central Circle-4, Thane	Vs.	M/s. HALLMARK DEVELOPERS No. 149/150, Tara Castle, Masoli, Dahanu Road, Dahanu, Mumbai- 401501
		PAN/GIR No. AADFH3619M
(Appellant)	..	(Respondent)

&

**ITA No.1586/Mum/2018
(Assessment Year: 2009-10)**

M/s. HALLMARK DEVELOPERS No. 149/150, Tara Castle, Masoli, Dahanu Road, Dahanu, Mumbai- 401501	Vs.	JCIT, Palghar Range, Palghar.
PAN/GIR No. AADFH3619M		
(Appellant)	..	(Respondent)

Revenue by	Shri. Sandeep Raj, CIT-DR
Assessee by	Shri. Aasim Thakkar, AR
Date of Hearing	12/03/2020
Date of Pronouncement	12 /06/2020

आदेश / O R D E R

PER G.MANJUNATHA: ACCOUNTANT MEMBER

These cross appeals filed by the Revenue as well as the assessee are directed against order of the Commissioner of Income Tax (Appeals)-3, Thane, dated 15/12/2017 and they are pertains to

Assessment Year 2009-10. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

2. The Revenue has raised the following grounds of appeal:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the expenditure of Rs. 31.42 crores on account of bogus contractual expenditure.

(a) The Ld. CIT(A) erred in holding that the tax paid by M/s Metcon India at the maximum marginal rate will grant immunity to the assessee even when both are two different entities and there is no question of double taxation involved.

(b) The Ld. CIT(A) decided the issue without appreciating that the Hon'ble Income Tax Settlement Commission rejected the plea of the Department citing that it cannot revisit the additions made in the assessment order passed by the Assessing Officer before the Search action in view of the decision of the Hon'ble IT AT in All Cargo Logistics.

(c) The Ld. CIT(A) decided the issue without appreciating that the observation of the Hon'ble Income Tax Settlement Commission does not have a bearing on the assessment concluded prior to the search action.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing 50% of the direct expenditure disallowed amounting to Rs. 4.5 crores out of Rs. 9 crores.

(a.) The Ld. CIT(A) decided the issue without appreciation that the direct expenditure of Rs. 5.91 Crores claimed by the assessee on account of purchases made from M/s JB Enterprises is bogus as the party is one of the hawala entry provider in the list prepared by the Sales tax Department and the assessee failed to prove the genuineness of the party.

(b.) The Ld. CIT(A) decided the issued without appreciating that the direct expenditure of Rs. 2.92 crores claimed by the assessee on account of purchases made from M/s arash Developers is bogus as the party is one of the partner in the assessee firm and had no stock to supply to the assessee.

3. The assessee has raised the following grounds of appeal:

1. *The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of Rs.4,50,00,000/- out of addition of Rs.9,00,00,000/- made by the Assessing Officer for direct expenses material only on estimation and without any basis.*
2. *The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of Rs. 71, 00,000/- made by the Assessing Officer for the compensation paid to retiring partners.*
3. *The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of Rs. 30, 00, 000/- made by the Assessing Officer in respect of salary and wages.*

4. The brief facts of the case are that the assessee, M/s Hallmark Developers is engaged in the business of investment into Real estate, Development of lands, Construction of buildings and commercial properties, has filed its return of income for the assessment year 2009-10 on 30-09-2009, declaring total income of Rs. 7,46,79,830/-. During the previous year relevant to assessment year 2009-10, the assessee had entered into an MOU dated 11-01-2008 with Ms Nunlet Project Private Limited for sale of plot of land admeasuring 9.41 acres at Nagpur for a consideration of Rs. 85.50 crores. The said land has been purchased on 5-7-2005 from M/s Maharashtra State Handloom Corporation Limited for a consideration of Rs. 8,05,00,000 and registered by paying stamp duty of Rs. 43,52,100/-. As per the terms of MOU, the assessee is required to clear illegal encroachments in land, levelling of land, Rock cutting and other works before the said land is being conveyed to sellers. Further, to keep the land in sealable condition, the

assessee had assigned land development work to M/s Metcon India, a category AA government contractor and accordingly, a separate work order and agreement is entered into with the contractor with scope of work to be done and for this purpose a sum of Rs. 36,08,96,156/ has been paid to M/s Metcon India, and debited to profit and loss account under the head contract charges. The assessee had also incurred various other expenditures, including direct expenses materials purchase amounting to Rs. 9,00,00,000/-, brokerage payment of Rs. 100,93, 118/-, amount paid for arbitration award amounting to Rs. 5,00,00,000/-, compensation to retiring partners of Rs. 71,00,000/- and salary and wages expenditure of Rs. 30,00,000/-.

5. The case has been selected for scrutiny and during the course of assessment proceedings; the AO has called upon the assessee to furnish necessary evidences for all expenditure and to justify nexus between expenditure incurred under various heads of expenses to the business activity. During the course of assessment proceedings, the assessee has filed details of expenditure incurred under various heads of expenditure along with necessary evidences and also justified necessity of incurring those expenditures in connection with its business activity. The AO was not convincing with the evidences

filed by the assessee with regard to various expenditures incurred under various heads of expenditure. According to the AO, the assessee was failed to offer any explanation and evidence that the same has been incurred wholly and exclusively for the purpose of business, which is development of land. To arrive at above conclusion, the AO had taken support from various external information including physical inspection of land, obtaining information from the seller of land M/s Maharashtra State Handloom Corporation Limited, buyer of the Land M/s Nunlet Projects Private Limited, photographs taken at land on 24-12-2011 and opinion of DVO for drawing adverse inference against the assessee. The AO had also taken support from the fact that the assessee had entered into transactions with associated/ related parties. Accordingly, he came to the conclusion that various expenditures incurred under the head direct expenses materials, contract charges, brokerage payment, arbitration award, compensation to outgoing partners and salary and wages are not incurred wholly and exclusively for the purpose of business, i.e. land development and also said expenditure is excessive and unreasonable within the meaning of section 40A(2). Accordingly, he has completed the assessment by making following additions/ disallowances of expenditure. The relevant findings of the Id. AO are as under:

i. Direct expenses material	Rs.9,00,00, 000/-
ii. "Brokerage	Rs.1,00,93, 118/-
iii. Arbitration award	Rs.5,00,00, 000/-
iv. Compensation to retiring partners	Rs.71,00, 000/-
v. Contract Charges	Rs.34,08,96,165/-
vi. Salary & Wages	Rs. 30,00,000
Total	Rs.50,10,89,283/-

Aggrieved by the above additions, the appellant is in appeal, before me.

3.0 Relevant extract from the Assessment order:

"14.1. First ground for rejecting the claim of the assessee based on facts culled from the submissions made by the assessee and from external sources available in public domain,:

a). Few photographs of the plot at Nagpur taken on 24.12.2011 are placed on record. These photographs reveal the actual condition of the subject and even as on i.e. 24.12.2011. The land is neither levelled nor showing any sign having been "developed". In short, there is nothing to indicate that the land claimed to have been developed by the assessee at a cost over Rs. 61 crores (Rs. 49.84 + Rs. 11.65 Crores) has any features of a "Development Land". The terrain and topography of the ground is similar to that of the adjoining and surrounding plots. In fact, the adjacent land is still owned and used by M/s MSHC as its office.

Outside of the said land in the adjoining plots there are residential buildings, office buildings, godowns etc which are habituated. The office building and godowns of M/s MSHC were being used even in the year 2005 i.e. year of purchases. Therefore the claim made by the assessee that the condition of the land at the time of purchase was abysmal and very bad and this necessitated a huge expenditure on its development is totally contrary to the real picture.

The said piece of land is demarcated from the adjoining area on one the assessee's own estimate the cost of construction of the wall is Rs. 60,88,3Q6/- The other three sides have been fenced by tin-sheets which is claimed to have been places by the purchaser that is M/s NPPL.

b). On the date of sale of the land i.e. 05.09.2008, the Stamp Duty Authorities had assessed the value of the said plot as Rs. 18 Crores. This valuation by he said authorities appears reasonable given the fact that the plot was purchased for Rs. 8.05 Crores on 5th July 2005. Also the authorities would inspect and value the property and such valuation would definitely include the cost of land plus cost of improvement, before arriving at the market value. Therefore it is evident that the assessee has inflated its claim of development costs.

c). The assessee firm is not the only one in the business of land-development. There are hundreds of developers across the country. Development expenses claimed by any developer ranges from around Rs. 2 lacs per acre to Rs. 10 lacs per acre. Therefore the maximum expenditure on supported by the approved rates available in the DSR published for FY 2008-09 for PWD, Govt. of Maharashtra approved contracts. Other assessee have claimed the cost of building dams across rivers at a cost of Rs. 5 crores and Aqueducts (a 3 layer conduit) at a cost of Rs. 6.5 Crores.

d). M/s NPPL, the purchaser has vide letter dated 19th Dec. 2011 written in reply to this officer letter dated 25.11.2011 have clarified that they have taken possession of the land on 5th September 2008 and that all the development work such completed before the execution of the sale deed i.e. before 5th September 2008. This means that after 5th September 2008 the assessee could have been incurred any expenditure for development of the said land. Further, in the sale deed dated 05.09.2008 there is a mention of the negotiations having started in early 2008 and an agreement of sale being signed by the assessee and M/s NPPL on 04.02.2008 this fact, in combination with the fact that the assessee has admitted that the work had to be taken up in hurry for which it had incurred an expenditure of Rs. 11.65 crores in FY. 2007-08 by allotting the work to its sister concern M/s MetconIndia, indicates that the work of development was completed on or before 05.09.2008. i.e. the date of execution of the deed. In view of the facts detailed above the claim of the assessee that it had incurred an expenditure of Rs. 49.84 crores on "Development of land" in this year is not only unreasonable, but also baseless and unsubstantiated. Therefore the claim cannot be accepted and disallowance as discussed in subsequent paragraphs is made.

14.2. Second ground for rejecting the claim of the assessee based on accounts and bank statements:-

A) On going through the sale deed of the Nagpur property dated 05.09.2008, the balance sheet as at 31.03.2008 and the bank statements of Canara Bank A/c No. 0119201003280 the following discrepancies are noticed.

I) Receipts shown in balance sheet as on 31.03.2008 (liability side):-

- | | |
|--|-------------------|
| a) Unsecured loan from Nunlet Projects Pvt. Ltd. | Rs.2,00,00,000/- |
| b) Advances received for Nagpur Land | Rs.16,08,69,806/- |

Total Rs. 18,08,69,806/-

Receipts from NPPL shown in the Bank a/c (Canara Bank) in FY 2008-09 (as per the books of the assesses and as per Bank Statement)

- | | |
|------------------|----------------------|
| a) On 08.07.2008 | Rs.11,01,18,384/--\$ |
| b) On 06.09.2008 | Rs. 9,93,192/--\$ |
| c) —do— | Rs.70,00,00,000/-* |
| d) —do— | Rs. 2,67,50,000/-* |

TOTAL Rs. 83,78,61,576/-

III). Receipts shown as per sa/e deed dated 05.09.2008

- | | |
|--------------------------------------|---------------------|
| a) Advance | Rs. 2,00,00,000/-* |
| b) Advance on 26.07.2008 | Rs. 18,82,50,000/-* |
| c) On execution date i.e. 05.09.2008 | Rs, 72,67,50,000/~* |

TOTAL Rs. 85,50,00,000/-

Reading the above three receipts (I,II and III) it is evident that the assessee has received excess consideration over and above the receipts as per sale deed s quantified below:-Untallied amounts : (indicated with \$)

- | | |
|---|--------------------|
| i) Advances received for Nagpur Land | Rs. 16,08,69,806/- |
| ii) Deposit in Bank from NPPL on 08.07.2008 | Rs. 11,01,18,384/- |
| Hi) Deposit in Bank from NPPL on 06.09.2008 | Rs. 9,93,192/- |

- | | |
|--|--------------------|
| iv) Advance given on 26.07.2008 as per sale deed | Rs. 10,82,50,000/- |
| | Rs. 38,02,31,382/- |

The assessee was asked to explain this discrepancy and reconcile the figures. Vide letter dated 27.12.2011 the assessee has explained that an amount of Rs.9,93,192/- and Rs. 28,61,576/- was actually re-imburement of expenses received from M/s. NPPL for municipal taxes etc and that these have not been debited by the assessee in the P/L account This is verified and accepted. However, as regards the advance amount of Rs. 16.08 crs the AR states in the said letter dated 27.12.2011 that 'these were old loans/advances taken for purchases of Nagpur land and the same is appearing in the Balance-sheet and paid off during the year. This is not the correct fact. As per the Audit Report and Annexures for FY 2007-08 and FY 2008-09, this sum of Rs. 16,08,69,806/- is actually the loans taken by the assessee from the relatives of the partners and sister concerns. Since this is the extent of Rs. 16.08 crores is taken as explained.

B. Closing and opening balances of important ledgers accounts

As per the balance sheet as at 31.03.2008:

Closing credit balance of M/s Metcon India is Rs. 1,35,29,969/-

Closing credit balance of M/s Tarash Developers Pvt. Ltd. (TDPL) is Rs, Nil

As per the signed copies of confirmation of accounts (from the books of the -assessee-)*

Opening credit balance of M/s MetconIndia is Rs. 12,28,36,328/

-Opening credit balance of M/s TDPL is Rs. 27,42,598/-

Opening credit balance of M/s Metcon India is Rs. 64,010/-

Opening credit balance of M/s TDPL is Rs.(Rs. 27,42,59s/- transferred to current account of partner)

As per bank statement (Canara Bank A/c. No. —)

Payments made to M/s Metcon India is Rs. 42,47,27,694/-

Payments made to M/s TDPL is Rs. 7,45,00,000/-

As per balance sheet as at 31.03.2009:

Closing Credit Balance of M/s Metcon India is Rs. 37,07,471/~

Closing Credit Balance of M/s TDPL is Rs. Nil (Rs.27,42,598/- transferred to current account not reflected in the capital account of partners)

Capital Accounts:

	Shri Ashok Mehta	Smt. Rakshita Mehta	M/s TDPL
Opening Bal. as on 01. 04. 2008 as per ledger	Rs.3,99,88,051/-	Rs. 44,27, 469/-	Rs. 1,160/-
Opening Balance as on 31.03.2008	Rs.3,99,88,051/-	Rs. 44,27,469/-	Rs.11,160/~
Closing Balance as	Rs. 77,87,279/~	Rs. 1, 99, 72, 63 5/-	Rs.4,73,95,676/-

per ledger as on			
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31.03.2009			
Closing Balance as per Balance sheet as on 31.03.2009	Rs. 76,26,526/-	Rs. 1,68,11,882/-	Rs. 4,72,30,981/-

(IV). Bank accounts:

As per balance sheet as per at 31.03.2008

Balance—Canara Bank, Rs. 2,657/-

Balance ICICI Bank Rs. 17,592/-

Balance DRD Janta Bank Rs. 32,849/-

Opening Balance as per bank statements

Balance Canara Bank Rs. 2,657/-

Balance ICICI Bank Rs. 88,98,900/-

Balance DRD Janta Bank Closed on 28.03.2009 (Statement not given) Closing balance as per bank statements

Balance Canara Bank Rs. 3,49,72,714/-

Balance ICICI Bank Rs. 8,38,110/-

Balance DRD Janta Bank closed on 28.03.2009 (statement not given)

Reconciliation with cash book submitted. However, closing Balance appearing in the balance sheet as at 31.03.2009

Balance Canara Bank Rs. 6,47,56,314/-

Balance ICICI Bank Rs. 8,38,110/- (Appearing as balance with DRD Janta Bank)

Balance DRD Janta Bank {Closed on 28.03.2009}

There are other discrepancies in the accounts. The assessee was asked to reconcile the figures and asked why there are discrepancies. The explanation was that due to fire at the officer, most accounts were destroyed and they were re-constructed. A copy of the FIR is placed on record.

14.3. Third ground for rejecting the claim of the assessee based on law as per the provision of the IT Act, 1961

A). The claim in respect of development expenses is being made u/s 37 of the IT Act, 1961 section 37 read as under:

"Any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head of "profits and gains of business or profession"

[Explanation. - For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

The emphasis is on 'laid out or expended wholly and exclusively for the purpose of the business. It is further explained that any amount incurred for any purpose

which is as "offence" or "prohibited by law" cannot be deemed to have been incurred for the purpose at barrier.

Therefore, even if the assessee's claim is to be considered on the basis of construed as having been "incurred" or "laid out", the assessee is not able to lead any evidence that the same has been incurred exclusively & wholly for the purpose of business, which is "development of land". Therefore the assessee's claim is untenable as per the provisions of section 37 since the necessity and business expediency of the expenditure is unsubstantiated.

B) Applicability of section 40A(2):

From the submission made by the assessee it is seen that a major part of the claim of development work has been allotted to its sister concern for e.g. (i) Out of contract charges of Rs. 36.08 crores debited in this year, an amount of Rs. 31.42 crores and Rs. 17,39,415/- is claimed to have been paid to the sister concerns of the assessee viz. M/s Metcon India and M/s Hallmark Realtors Pvt. Ltd.

(ii) Out of total purchases of Rs. 9,33,21,420/- an amount of Rs. 2.93 crores is claimed to have been made to M/s Taraash Developers Pvt. Ltd. (TDPL), a partner of the assessee firm.

Presuming though not admitting, that the above expenses are expended for the business, the claims of payments to sister concerns fall within the purview of section 40A(2). The assessee was asked to explain why the same should not be considered as disallowance u/s 40A(2).

The assessee vide letter dated 26.12,2011 gave very general explanations which are summarized above at para 12.2 above and has argued that the payments made to sister concerns are justified and that the provisions of section 40A(2) are not to be applied. Various case laws have also been cited in support thereof. The assessee's argument cannot be accepted since the basic question that still remains to be answered is whether "an expenditure of Rs. 61 crores can really be incurred for doing the above mentioned work on a plot of land admeasuring 9.41 acres and as pointed out in some of the case laws cited by the assessee itself, the question to be asked is "is it prudent to incur such huge expenditure only on development of the said land?" in fact this is exactly the central issue in this entire assessment. Hence the assessee's objection for disallowance u/s 37 and section 40A(2) is not acceptable.

For all the above mentioned reasons based on the facts, accounts and law, the assessee's claim for the expenditure of Rs. 49.84 crores. As laid out in the P & L Account is rejected and a fair estimate of around Rs. 2.33 crores is allowed as development expenses. To conclude, after considering the entire subject matter and all the explanations offered by the assessee the total expenditure that could have been possibly incurred on the 9.41 acres of land is estimated at a reasonable figures of Rs. 2.33 crores for this year. 15. Other points:-

15.1. compensation/damage as per Arbitration Award

There is a claim of Rs, 5 crores in the profit and loss account under the head "compensation/damage as per Arbitration Award". Details were called for and the same were furnished. In brief, the facts on this point are as follows.

On 14.09.2006 the assessee firm signed a Memorandum of Understanding (MOU) with M/s Hindustan Continental Ltd. (HCL) Andheri, Mumbai to develop & construct a residential cum commercial building on the land at Nagpur. Under the terms of the MOU M/s HCL had undertaken to construct a building after developing the land entirely at its cost. For this purpose the assessee firm had asked for Rs. 10 crores bank guarantee. As per the terms, the assessee had to get the necessary clearances from various Government Authorities and get the land converted from industrial land to residential/commercial land. There was delay and inaction on the part of both the parties of the MOU. M/s. HCL also could not provide the bank guarantee of Rs.10 crores. A dispute arose. This was settled with the help of the pre agreed arbitrator. The award was decided by the Arbitrator after into consideration the claims of both the parties... In support of the claim the assessee's AR brought the claims of both the parties. In Shri S.K. Kulhari, who stated that he was not aware of this Nagpur Land HCL the profit and loss a/c, balance sheet and bank statement for the relevant period. The same are on record. It was also stated by Shri S.K. Kulhari that Nagpur land transaction was known only to Late Shri MukeshTulsian who expired in Oct. 2010. In view of incomplete information the said payment is unverifiable. Hence the same is rejected.

Second reason for disallowing the claim of Rs.5 crores is that, the compensation paid to M/s. HCL cannot be considered as a genuine business expenses since the damages have been paid for non-performance of profit and loss account of the current year is disallowed.

Incidentally it needs to be mentioned here that at para 20 at page no. 9 Arbitrator has accepted M/s. HCL claim that they had invested some money for development purpose and also their time for different work of land development" In the same order the assessee has put forth the claim vide their letter dated 07.11.2006 and subsequent letters that they had complied with their part of the terms of conversion of land use, 80% of removal of

encroachment etc. this is also evidence that some expenses on the land has already been incurred in financial year 2006-07.

15.2 The other major expense of Rs.1,00,93,118/- is debited as brokerage charges paid to various parties. Details were called for. It is seen that in the party wise list the payment total to Rs.1,10,92,061/- and as per the debits in the P & L A/c the amount shown is Rs.1,00,93,118/-. This indicates the discrepancy in the amount of claim. Since it has already been explained above that the only major sale transaction was of the Nagpur Land therefore it is not clear as to the brokerage being paid to more than one party. Moreover the claim of the assessee is not verifiable hence claim of brokerage expenses is disallowed.

15.3 Compensation paid to retired partners: During the year the assessee has claimed to have paid Rs.71 lakhs as compensation to Dinesh Shah Group and Navinchandra Shah Group who were the erstwhile partners of the assessee firm. Vide letter dated 12.09.2011 the assessee explains that there were dispute and difference of opinion amongst these group of partners and due to this it was decided to discontinue association with them and a retirement deed was made on 01.04.2008. Accordingly, compensation of Rs. 71 lakhs has been paid to

them. In support of his claim Retirement Deed dated 01.04.2008 is furnished. However, it is seen from the balance sheet as on 31.03.2008 that the capital accounts of these two shah groups are not appearing with either credit or debit balance in Balance Sheet. Therefore there is no justification for making such compensation payments and making it a charge on profits of this year. Even if the payment is genuine it cannot be allowed as a debit in the P/L A/c since it is more of an appropriation of profit and cannot be deducted from profits. Moreover, it is seen that in the P/L A/c of the previous financial year i.e. F.Y. 2007-08, the assessee has already claimed compensation paid to partners to the tune of Rs.25 lakhs. If any further dues had accrued to the erstwhile partners of the firm, the same should have been paid from the profits appropriated by other partners in the earlier period. The assessee was also asked to produce the basis of working for making such payments which were not furnished. It is merely explained that it was a mutual agreement and allowable u/s 37, hence the claim of the compensation paid to retired partners is disallowed.

15.4 In this year the assessee has claimed salary & wages to the tune of Rs.35,74,800/- as compared to last year's claim of Rs.4,38,216/-. Moreover the year as discussed in length above, the firm had effectively no business activities after 05.09.2008. Therefore, the claim is considered to be excessive and unverifiable. Hence out of the above an amount of Rs.30,00,000 is disallowed.

16. Vide letter dated 27.12.2011 the assessee has made a fresh claim to consider the gain on sale of land at Nagpur as capital gain instead of business income. This is an afterthought and cannot be considered at this stage of assessment. Moreover, the said land has been taken to be part of WIP in the P/L a/c of this year and earlier year. The intention to treat this land as part of the business asset is also evident from the agreement for development entered into by the assessee through the above referred MOU dated 14th Sept. 2006. Hence the claim is rejected.

6. Being aggrieved by the order of the Assessing Officer, the assessee has preferred an appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee has filed detailed written submission along with application for admission of additional evidences under Rule 46A of the Income Tax Rules 1962 vide letter dated 14-06-2012. During the course of appellate proceedings, the Id. CIT(A) has forwarded additional evidences filed by the assessee to the AO for his comments and report. The AO vide his remand report dated 29-03-2012 has commented upon additional evidences and their

admissibility. The remand report was made available to the assessee firm, for which it has filed rejoinder dated 23-05-2012 and rebutted allegations of the AO in tabular format. The assessee had also filed additional written submissions from time to time and filed all possible evidences including, bills and vouchers in respect of all expenses, including contract charges etc.,. The assessee had also filed agreements with M/s Metcon India for awarding works contract for development of land and payment details and argued that the work order has been issued after obtaining competitive bidding. The payment to contractor has been made after deducting applicable TDS as per law. The evidences of the work having been physically under taken were furnished including photographs taken at site. Similarly, the assessee had filed all evidences in respect of direct expenses material purchase, arbitration award expenses, salary and wages and compensation paid to retired partners and explained under what circumstances it was forced to pay compensation to outgoing partners.

7. The Id. CIT(A) after considering relevant evidences filed by the assessee and also taken into account remand report furnished by the AO has partly allowed appeal filed by the assessee, where he has allowed 50% relief towards direct expenses materials purchases

and out of addition of Rs. 9,00,00,000/- a sum of Rs. 4,50,00,000/- has been allowed as relief and balance amount of Rs. 4,50,00,000/- has been confirmed. In so far as disallowance of contract charges, the Id. CIT(A) has deleted additions made by the AO on the ground that the assessee has furnished all evidences including work having been physically under taken at site. The CIT(A) further observed that the AO has made additions on suspicious and surmise manner, ignoring all evidences filed by the assessee on the basis photographs taken on 24-12-2011, even though the assessee has filed photographs taken at site where the evidences of work being done at site was clearly established. The Id. CIT(A) has also taken support from the letter of Jt. MD, MSHCL, where he had admitted the fact of land was in illegal encroachment, existence of nalas, ponds and rocks at the time of sale. The other important fact considered by the Id. CIT(A) is order of settlement commission, where M/s Metcon India has admitted additional income of Rs. 24.40 crores for AY 2008-09 out of contract charges received from the assessee and this fact has been confirmed by the CIT in his Rule 9 report. Therefore, he opined that the AO was incorrect in coming to the conclusion that the assessee has failed to prove necessity of incurring huge expenses in connection with sale of land and accordingly, deleted addition made by the AO towards contract

charges. As regards other additions being arbitration charges paid to Hindustan continental Limited (HCL), the Id. CIT(A) held that the assessee has filed overwhelming evidences whose veracity is not under challenge in cross verification proceedings and accordingly, there is no reason to sustain additions on this regard. Hence, he has deleted additions made towards arbitration award expenses. Likewise, the Id. CIT(A) has deleted additions towards brokerage charges paid to brokers Mr Indrajeet Singh, Balvinder Kaur and Rare earth property on the ground that various evidences has been filed to prove payment of brokerage charges. However, he had confirmed additions towards compensation to ex-partners amounting to Rs. 71,00,000/- and Salary and wages amounting to Rs. 30,00,000/- on the ground that no evidences and reasons has been furnished to prove and justify payment of compensation to partners and salary and wages to employees. The relevant findings of Id. CIT(A) are as under:

(i) Coming to the disallowance of direct expenses material of Rs.9,00,00,000/- under provisions of section 37(1) of the Act, I am in agreement with the AO that the onus to prove that the expenditure in question has been incurred wholly and exclusively for the purpose of business is on the appellant. The appellant has contended that the expenditure in question has been incurred exclusively and wholly for the purpose of business. To support this proposition it has furnished accounting details and other ancillary records such as work orders, MOU, photographic evidences of the site etc. It has also been contended that the land development had commenced in the earlier year i.e. A.Y.2008-09 and the contract granted to Metcon India in the earlier year has not been questioned. In fact, even subsequent to the

completion of assessment under appeal, no reassessment or Revisional proceedings have been initiated for the immediate preceding year i.e,A.Y.2008-09. Therefore, where the land development had not been doubted in the earlier year, there was no reason to doubt the same in the subsequent year particularly, when there was no change in the facts and circumstances of the case. The appellant contended that the contract charges had been paid to Metcon India in the earlier year also. The AO has also conducted cross inquires with the purchaser/vendor of the land and nothing adverse has been brought on record.

(ii) I am however, inclined to agree with the AO that the onus to prove that the expenditure in question has been incurred wholly and exclusively for the purpose of business is on the appellant. The appellant has no categorical reason to explain as to why substantial purchases have been made from group concerns only. The AO has pointed out that purchase of Rs.2.93 crores has been made from M/s Taraash Developers Pvt. Ltd., partner of the appellant firm. No specific reason has been furnished for making such purchases. Such purchases from group concerns definitely arouse suspicion and doubts. In view of the totality of the facts and circumstances and in fairness of the above, I hereby confirm 50% of the disallowance of purchases made amounting to Rs.4,50,00,000/-, out of Rs. Rs.9,00,00,000/-and the same is added to the total income of the appellant. The appellant gets relief for the balance addition amounting to Rs.4,50,00,000/-.

(iii) Coming to the disallowance of contractor charges of Rs.34,08,96,165/-it is submitted that the total contract charges paid are as Rs.36,08,96,165/-. The contract charges paid to Metcon India is Rs.31,42,34,561/-. Therefore, though the underlying reason for making disallowance is on account of contract assigned to Metcon India, the additions have been made far in excess of the payments made to Metcon India.

(iv) In this case, the appellant has carried out the due diligence regarding the assignment of contract work to M/s.Metcon India. The events and sequence regarding work contract are discussed in chronological order:- **a)** The appellant has signed MOD with Nunlet Projects Pvt. Ltd.(the buyer) to handover the land after developing. The development, include removal of marshy soil, illegal encroachments, rock cutting, leveling etc and after completion of development, the land was transferred to the buyer, vide sale agreement dtd. 05.09.2008. **b)** The appellant has assigned the contract work to Metcon India, being the lowest bidder as compared to Sportina Exim Pvt. Ltd. & Singa Transport Carriers **c)** The appellant has also deducted TDS on the contract work assigned to Metcon India and the contract receipts are reflected in the accounts of Metcon India, **d)** In response to AO's query, the JT. MD of MSHCL (Vendor of the Land) has confirmed of the existence of nalas, ponds and other illegal encroachment in the land at the time of sale, vide D.O.NO.MSHC/ESTT/2883/2012 dated 27.03.2012. **e)** In response to AO's letter dtd. 25.11.20U, M/s.Nunlet Projects Private Limited, vide letter dated 19.12.2011 has confirmed and the same is reproduced as below:-

(v) "a) Date of execution of sale deed: 05 September 2008 .

b) (i) Total Land area acquired:9.41 Acres (38,085.19 Sq.Mtrs)

(ii) **Whether any encroachments and illegal occupations were there at the time of agreement:**

c) During the initial stages of negotiations and site visits, we have found that there were lot of hutments, encroachments and illegal occupations on the said property. As the negotiations progressed with the Hallmark Developers, we made it clear that we wanted that land free from all encumbrances, free from illegal encroachments and occupations, etc. and most importantly in the leveled and presentable form. Hallmark Developers got the entire land cleared from all the encroachments and hutments etc. except one small Mandir/Temple could not be removed. We hereby further inform that at the time of handing over the land, Hallmark Developers had given us the peaceful possession of the land to us free from encroachment and/or illegal occupations. This information is to the best of our knowledge and information at that time. **(iii) whether land had been converted from industrial to commercial /residential use on the date of purchase:**

We hereby inform that Hallmark Developers got the land use changed from Industrial to commercial. And we further inform that this change in land use to commercial was done by Nagpur Mahanagar Pallika, Nagpur vide its letter no.s, MPN/NRV/566, 600 and 627 dated 05 July 2008, 17 July 2008 and 24 July 2008,

c)(i)Whether any construction activity and/or excavation and rock cutting had been carried out on the said land on the date of purchase:

As we, hereinabove, have informed that the said land was occupied by hutments and unauthorized occupants. This land had a big slushy pond with garbage dump area on the other side. As per our finalized negotiations and conditions, Hallmark Developers executed the work of removal of slushy/muddy earth, excavated and transported the black cotton soil, chiseled and excavated the fragmented/weathered rock, executed RCC wall work below the boundary wall supported with girders etc., barricaded and fenced, made boundary wall, filled the excavated area with murrum. Hallmark Developers has also demolished that already constructed high roof sheds on to the said land and removed the debris. The land was properly developed and leveled before the execution of the sale deed.

(ii) Whether any leveling, plotting or fencing work had been done before the date of purchase:

We inform that high roof sheds were constructed along with the work executed as mentioned hereinabove in clause c(i). As per our finalized terms and conditions of leveled land, the existing structures were demolished. Apart from this, land development work and the fencing was completed with fast pace by Hallmark Developers at their own cost. We further inform that at the time of purchase, the land was properly segregated from surrounding properties/buildings by boundary wall and barbed by wire fencing with concrete poles in leveled condition, free from all encroachments.

d) Status of land after purchase: After the purchase of land, we are in process of developing the land. The concept and design etc. has been finalized and submitted in the concerned authorities. But now the delay

has happened mainly due to, some modifications in the policy of the concerned authorities."

v) In fact, even subsequent to the completion of assessment under appeal, no reassessment or Revisional proceedings have been initiated for the immediate preceding year i.e. A.Y.2008-09. Therefore, where the land development had not been doubted in the earlier year, there was no reason to doubt the same in the subsequent year particularly, when there was no change in the facts and circumstances of the case. The appellant contended that the contract charges had been paid to Metcon India in the earlier year also.

vi) The fact that Metcon India had been assigned the contract after obtaining competitive bids cannot be ignored. The contentions of the appellant that even the subsequent search proceedings initiated did not reveal the exchange of cash in lieu of cheques payments made for contractor charges have considerable force in support of the genuineness of the transaction. The AO has not brought about any material or other evidence on record on the basis of which it can be inferred that the contractor charges paid were sham or non genuine leave alone the same being excessive or unreasonable. Most importantly, the appellant had been subjected to search proceedings and had approached the Hon'ble ITSC for the settlement of their tax liabilities with regards the proceedings u/s 153A. The Hon'ble Commission has in the order passed u/s 245D(4) of the act dated 24.03.2014 on pg.16 thereof has held as under:

"We a/so agree with the contention of Mr. Thakkar, that for the bogus purchases which are once admitted in the case of the applicant-firm, M/s Metcon India, a further addition in the case of M/s Hallmark Development on similar grounds cannot be made as suggested by the CIT in his Rule 9 report. It is to be noted that the accommodation bills which have been offered to tax by M/s Metcon India (Rs.24.4 crores) relate to the asst. years 2008-09 & 2009-10 when the Nagpur Land project was executed. These accommodation bills have direct nexus and connection with the development work undertaken by the applicant firm, M/s Hallmark Developers. While suggesting addition of the similar amount in the case of the applicant firm,

M/s Hallmark Developers, the CIT in his Rule 9 report, in fact, has accepted the direct nexus between the bogus expenditure incurred by M/s Hallmark Developers and the cash generated through the accommodation bills by M/s Meteor? India. Therefore, the contention of the CIT, made in the Rule 9 report, for making addition of similar amount in the case of the applicant firm, M/s Hallmark Developers cannot be accepted."

The order passed by the Hon'ble ITSC is final and conclusive. Furthermore, \ the aforesaid order has not been challenged before the High Court/Supreme Court. Therefore, the findings of the Hon'ble ITSC, being that of a superior body has to be accepted. Since M/s. Metcon India has already offered the

expenses related to the Nagpur Land as its income and the nexus of the same having been accepted by the Hon'ble ITSC and the CIT in his Rule 9 report, the making of disallowance in the hands of the appellant firm would not be justified. M/s.Metcon India has paid the tax at the Maximum

margin rate and it is not that, the contract receipt has been adjusted to reduce the taxable profit. In view of the above, the additions of Rs.34,08,96,165/- made by the AO is deleted and the appeal of the appellant on this ground is partly allowed.

(i) I have gone through the contentions of the AO and the submissions of the appellant. I find that the payments in question have been made in pursuance of arbitration proceedings. Where the payments have been made in pursuance of arbitration the sanctity cannot be doubted particularly when it has not been established that the arbitration proceedings are sham. The payments in question have been verified by the AO and the recipients have appeared in person and deposed to having received the amount. The nature of dispute has been highlighted which also has not been challenged by the AO. The payments in question have been disclosed by way of receipts and included in the return of income filed by HCL. Merely, because the other directors of HCL were not aware of the intricacies of the dealing cannot be the reason for doubting the payment of arbitration charges. The death of the director handling the dealings with the appellant and other directors not fully acquainted with the matter cannot be the reason for viewing the transaction with suspicion particularly when overwhelming evidences have been furnished by the appellant and whose veracity is not under challenge in the cross verification proceedings undertaken. I am therefore inclined to agree with the views of the appellant and direct the deletion of the addition of Rs.5,00,000/- made by the AO.

*(i) I have considered the facts and circumstances of the case. The appellant has pointed out that the transaction of Nagpur land was complicated and involved more than one broker. As such, brokerage totaling to Rs. 1,00,93,1187- was paid to three parties viz Indrajeet Singh, Balvindar Kaur, and Rare Earth Property Solutions apart from the professional charges paid to lawyers /C.A. totaling Rs. 9,98,9437-. The TDS has been deducted from the brokerage paid and payment of TDS has been accepted by ITO, TDS vide order dated 25.02.2010 u/s. 201(1)/201(1A). The disallowance of the brokerage without pinpointing the reasons in this nature of business, is against judicious approach, as was held in the case of **G.L. Gems vs. ACIT 4 ITR (Trib) 525 (2010)** wherein it was held that "There was no justification for making disallowance of an amount of Rs. 10,000 out of brokerage expenses without pin pointing the reasons for disallowance especially when payment of brokerage @ 2 per cent is in the routine practice of the business and there is no findings that any broker is related to the directors of the assessee company. It is also worth noting in the present case that the brokerage has been paid through account payee cheque. Hence this ground of appeal is decided in favour of the appellant. The AO has not refuted the submissions / contentions submitted by the appellant in this regard even in her Remand Report. Considering the details and the nature of business, and its practices and the fact that the payment to the brokers are not relatives of the partners of the assessee firm and the*

rate of brokerage being consistent with the trade practice disallowance made by the AO is not justified and is deleted.

- (i) I have carefully considered the contents of the assessment order and the Remand Reports as well as the contentions of the appellant filed during the assessment / appellate proceedings including the rejoinder to the Remand Report and other facts and details on record. It is an admitted fact that the expenses in question were not incurred exclusively and wholly for the purpose of business. Settling personal disputes with the funds of the appellant firm is not an expenditure incurred for the purpose of business as argued by the appellant. Merely, because a claim has been allowed in the earlier year does ipso facto lead to the conclusion that the same should be accepted in the subsequent year? The principle of res judicata operates in income tax proceedings. Each year is a separate and independent year and the findings in one year do not automatically become binding in the other years. Therefore, in view of the fact that the expenditure in question was not incurred exclusively and wholly for the purpose of business the same deserves to be disallowed and the additions is hereby confirmed.*
- (i) I agree with the contentions of the AO. The appellant has not furnished any cogent reason for retaining such staff in spite of there being no commercial business after the sale of Nagpur land. Financial and commercial prudence dictates that the businessman would try to maximize his profits and thereby maintaining such large no. of employees would not be a sound financial proposition. I hereby direct that the additions of Rs.30,00,000/- on account of salary be confirmed.*

8. The Id. DR appeared for the Revenue submitted that the Id. CIT(A) has erred in allowing the expenditure of Rs. 31.42 crores on account of bogus contract charges without appreciating fact that the Id. AO has brought out clear facts to the effect that the whole expenditure is bogus and arranged to reduce profit derived from sale of property. The DR further submitted that the Id. CIT(A) has erred in holding that tax paid by M/s Metcon India at maximum marginal rate will grant immunity of the assessee even when both are different

entities and there is no question of double taxation involved. The Id. CIT(A) failed to appreciate the fact that although Income Tax settlement commission has allowed relief to M/s Metcon India, but such relief was granted on different grounds altogether and it does not have any bearing on the assessment of assessee which is concluded before search in the case of M/s Metcon India. The Id. DR further submitted that the Id. CIT(A) has grossly erred in not appreciating facts brought out by the AO before making addition and he had simply gone on the basis of evidences filed by the assessee to allow relief in respect of addition towards contract charges. The Id. DR further referring to page No 482 of PB filed by the assessee submitted that, the Hon'ble Settlement Commission had recorded categorical finding in its order in respect of modus operandi of M/s Metcon India in obtaining bogus purchase bills and consequent siphoning of money to make investments in loans and advances in regular books of account and this was not reported to Income Tax Department. From the above, it is very clear that payment made to M/s Metcon India is a bogus expenditure which was routed through own associated company in order to reduce profit from sale of land at Nagpur. The AO had also obtained external information and conducted field enquiry which clearly proves the fact of not carrying out any development work at Nagpur Land. In fact the position of

land was unchanged when compared to date of purchase and date of inspection and this fact was further strengthened by the letter of Jt. MD, MSHCL. The Id. CIT(A) has ignored all these facts while allowing relief to the assessee.

9. In so far as disallowances of direct expenses materials, the Id. CIT(A) has decided the issue without appreciating the fact that direct expenses of Rs. 5.91 crores claimed by the assessee on account of purchases made from M/s JB Enterprises is bogus as the party is one of the hawala entry provider as per the list prepared by the Sales Tax Department and the assessee failed to prove the genuineness of the party. Similarly, direct expenses of Rs. 2.92 crores claimed by the assessee on account of purchases made from M/s Tarash Developers is bogus as the party is one of the partner in the assessee firm and had no stock to supply to the assessee. The Id. DR further submitted that the Id. CIT(A) has erred in allowing 50% relief without assigning any reasons as to why and how 50% expenditure out of purchases from those two parties becomes genuine, when facts brought out by the AO clearly suggest that purchases claimed to have made from two parties is bogus and non-genuine.

10. The Id. AR for the assessee, on the other hand submitted that the Id. CIT(A) has erred in partially allowed relief in respect of direct expenses materials purchase, even though the assessee had filed complete details of purchases with necessary evidences. The Id. CIT(A) has failed appreciate the fact that when 50% of expenditure is genuine, the remaining 50% expenses cannot be bogus or non-genuine. The AR further submitted that the assessee has filed bills and vouchers for purchases from two parties. The assessee had also explained nexus between materials purchases and development work undertaken at site. But, the CIT(A) has disallowed 50% of expenses only on the ground that major purchase has been made from group concern. In so far as contract charges, the Id. AR submitted that the Id. CIT(A) has appreciated and analyzed evidences filed by the assessee in light of various facts brought out by the AO and came to the conclusion that the Id. AO has made additions purely on suspicious and surmise manner, disregarding all evidences filed by the assessee. The assessee had also filed agreements with M/s Metcon India for awarding works contract for development of land and payment details and argued that the work order has been issued after obtaining competitive bidding. The payment to contractor has been made after deducting applicable TDS as per law. The evidences of the work having been physically

under taken were furnished including photographs taken at site. In fact, the seller of the land has confirmed that there exists a nala, illegal encroachment, hard rocks in the land. The purchaser of land has also confirmed having done all works before land was sold to them as agreed in MOU, including conversion of land from industrial to non-industrial purpose, clearing illegal encroachments and hutments, excavation of land, levelling, rock cutting, fencing etc.,. The photographs taken at site for having done development work at land have been filed before the AO. The AO has disregarded all evidences and made additions only on the basis of his own assessment of land position and photographs taken at site on 24-12-2011, without confronting those evidences to the assessee for its rebuttal. The Id. AR further submitted that the AO has arrived at a conclusion on the basis of his own assessment of possible expenditure required for development of land per acre, without appreciating the fact that the nature of land matters when it comes to amount of expenditure required to be spent for development. The AR further submitted that the Id. CIT(A) has also taken support from the findings of Hon'ble Settlement Commission in the order passed u/s 245D(4) in the case of the assessee firm, where it has been clearly held that accommodation bills taken by M/s Metcon India is in connection with works undertaken for contract with assessee firm for

development work at Nagpur land. Therefore, once addition on total expenditure was having been made in the name M/s Metcon India, the Revenue recommending making additions of similar amount in the case of the assessee was out rightly rejected by the ITSC. The CIT(A) after considering relevant facts has rightly rejected claim of the AO and has deleted addition towards contract charges.

11. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We have also carefully considered materials placed before us. The solitary issue that came up for our consideration from ground no. 1 and 2 of Revenue appeal and ground no. 1 of assessee appeal is disallowances of certain expenditure incurred in relation to development of land at Nagpur. The fact with regard to sale of land at Nagpur for the impugned assessment year was not disputed by the assessing officer. In fact, the AO has accepted revenue generated from sale land. The only dispute is with regard to claim of certain expenses with regard to sale of said land. The assessee claims to have incurred certain expenses, viz., direct expenses materials purchase, contract charges, arbitration award expenses, brokerage payment, compensation to retiring partners and salary and wages. The AO has doubted expenses incurred under various

heads including direct expenses materials and contract charges mainly for the reason that the assessee has failed offer any explanation that expenditure is incurred wholly and exclusively for the purpose of business. To arrive at above conclusion, the AO had taken support from various external information including physical inspection of land, obtaining information from the seller of land M/s Maharashtra State Handloom Corporation Limited, buyer of the Land M/s Nunlet Projects Private Limited, photographs taken at land site on 24-12-2011 and opinion of DVO for drawing adverse inference against the assessee. The AO had also taken support from the fact that the assessee had entered into transactions with associated/ related parties. Accordingly, he came to the conclusion that various expenditures incurred under the head direct expenses materials, contract charges, brokerage payment, arbitration award, compensation to outgoing partners and salary and wages are not incurred wholly and exclusively for the purpose of business, i.e. land development and also said expenditure is excessive and unreasonable.

12. The AO had disallowed direct expenses materials purchases on three grounds, viz, (i) Said expenditure is not incurred wholly and exclusively for the purpose of business within the meaning of section

37(1) of the Act. (ii) The said expenditure is excessive and unreasonable having regard to nature and extent of land development within the meaning of section 40A (2) of the Act. (iii) The AO had questioned prudence of incurring such expenditure for development of land. No doubt, the provisions of section 37(1) of the Act, places burden on the assessee who claims to have incurred expenditure to prove that said expenditure has been wholly and exclusively incurred for the purpose of his business. The assessee shall furnish necessary evidences to prove that said expenditure is in fact incurred for the purpose of his business. In order to discharge its onus, it has to file necessary evidences. In this case, on perusal of details available record, we find that the assessee has furnished complete details with regard to direct expenses materials, including bills from the suppliers. The AO has disallowed a sum of Rs. 9,00,00,000/- only the ground that major purchases is from sister concern and one of the supplier is in the list of hawala dealers as prepared by Sales Tax Department. The fact that major purchases have been made from associate concern does not alter the situation and it does not give power to the assessing officer to disallow whole expenditure on that ground alone. Further, the fact that one of the purchaser is in the list of entry provider as prepared by Sales Tax Department is also not sufficient to infer that the purchases from said

party is non-genuine. The additions which have been made by the AO are on a purely estimate and adhoc basis and there is no reference whatsoever to the basis of disallowances. There is no bar under any law for purchases from associate/ sister concern and when there is no bar under law, the AO cannot disallow entire expenditure for the simple reason that it has been purchased from associate concern. But, what is to be seen is whether such purchase is at arm's length and it was made for the purpose of business of the assessee or not. In this case, there is no doubt of whatsoever with regard to purchases of materials for the purpose of development of land. In fact, the assessee has established nexus between materials purchase and land development at Nagpur. The Id. CIT(A), having accepted the fact that development work has been executed, has disallowed 50% adhoc expense without assigning any reasons. Further, when 50% direct expense is genuine, then remaining 50% cannot be non-genuine merely because it was purchased from associate concern. Therefore, we are of the considered view that the AO as well as the Id. CIT(A) were erred in disallowing direct expenses materials purchase. Hence, we direct the AO to delete additions made towards direct expenses materials amounting to Rs. 9,00,00,000/-.

13. Coming back to disallowance of contract charges of Rs.34,08,96,156/- out of total contract charges paid of Rs. 36,08,96,165/-. The AO had disallowed contract charges mainly on the ground that no work has been undertaken at Nagpur land. The AO has arrived at above conclusion mainly on the basis of photographs taken at site and images downloaded from Google MAP. According to the AO, no development work was done in land and the nature of land was same as was at the time of purchase from MSHCL (Seller of land). The assessee, on the other hand furnished complete details of expenditure incurred for the purpose of development of land. The assessee had also filed agreements with M/s Metcon India for awarding works contract for development of land and payment details. The assessee had carried out due diligence regarding assignment of development work to M/s Metcon India, an AA category contractor registered with PWD, Govt. of Maharashtra. The assessee has assigned contract to M/s Metcon India, the lowest bidder among three bidders, viz, Sportina Exim Pvt Ltd and Singa Transport carrier. The payment to contractor has been made after deducting applicable TDS as per law. The evidences of work having been physically under taken were furnished including photographs taken at site. In fact, the seller of the land M/s MSHCL vide their letter dated 27-03-2012 has confirmed that there exists a

nalas, illegal encroachment, hard rocks in the land. The purchaser of land M/s Nunlet projects Private Limited, in reply to AO letter dated 25-11-1011 has also confirmed having done all works before land was sold to them as agreed in MOU, including conversion of land from industrial to non-industrial purpose, clearing illegal encroachments and hutments, excavation of land, levelling, rock cutting, fencing etc.,. The photographs taken at site for having done development work at land have been filed before the AO which clearly proves development work at land. In fact the assessee has done all works as agreed in their MOU with purchaser of land, including, conversion of land from industrial to non-industrial purpose, put up fencing including retaining wall around the land. The AO has disregarded all evidences and made additions only on the basis of his own assessment of land position and photographs taken at site on 24-12-2011, without confronting those evidences to the assessee for its rebuttal. The AO has arrived at a conclusion on the basis of his own assessment of possible expenditure required for development of land per acre, without appreciating the fact that the nature of land matters when it comes to amount of expenditure required to be spent for development. In this case, as per details available with us, the heavy expenditure on land was incurred on account of fact that the terrain of the land was very difficult. As per

the document available with us, the assessee has carried out various works as per the scope of work which includes, land filling and levelling, chain fencing, removal of slushy earth, Rock cutting, fabrication and erection of girder etc,. The photographs taken by the assessee at the time of remand proceedings revealed the scope and extent of work done at site. The independent enquiries conducted by the AO with both vendor and purchaser of land also proved the fact that the assessee had incurred huge expenditure for development of land. But, the AO has ignored and intentionally suppressed this information which was in his possession and on the contrary contended that information is culled out from public domain on the basis of which the addition is made. No doubt, it is the responsibility of the person who incurred expenditure shall discharge its onus by filing necessary evidences to prove that said expenditure is wholly and exclusively incurred for the purpose of his business and such expenditure is not excessive and unreasonable. In order to prove the same, he has to file complete details of expenditure and also to explain the nexus between expenditure and his business activity. In this case, there are no doubts of whatsoever regarding expenditure incurred for development of land. The overwhelming evidence furnished by the assessee has not been challenged by the AO during re verification proceedings. On the other hand, the Id. AO has

made additions towards contract charges purely on suspicious and surmise manner without bringing on record any evidence to prove that the assessee has received back equal amount in cash. There is no iota of evidences with the AO to prove his allegation that no work has been carried out at land. The evidences relied upon by the AO, including purported photographs and Google images were not shared with the assessee for its comments. Unless the evidences are confronted to the other side, the veracity of the same cannot be relied upon. It is trite and settled position of law that one cannot make additions unless and until the materials on which reliance is sought to be placed is confronted to the concerned person as held by the Hon'ble Supreme Court in the case of *C. Vasantlal & Co . v CIT* (1962) 45 ITR 206(SC). The fact that M/s Metcon India has been give work after due diligence and tender process cannot be ignored. The confirmations of vendor of land M/s MSHCL and the purchaser of land M/s NPPL is also cannot be ignored. From the above, it is undoubtedly proved that the assessee had undertaken land development work. We, therefore, are of the considered view that the AO was completely erred in disallowed contract charges paid to M/s Metcon India for development of land at Nagpur.

14. We, further noted another important aspect of the matter in light of order of the Income Tax Settlement Commission passed in the case of the assessee u/s 245D(4) of the Income Tax Act, 1961. The Hon'ble Settlement Commission in the order passed u/s 245D(4) in the case of the assessee firm has clearly recorded categorical findings that accommodation bills taken by M/s Metcon India is in connection with works undertaken for contract with assessee firm for development work at Nagpur land. Therefore, once addition on total expenditure was having been made in the name M/s Metcon India, the Revenue recommending making additions of similar amount in the case of the assessee was out rightly rejected by the ITSC. M/s Metcon India has already offered expenses related to Nagpur land as its income and the nexus of the same having been accepted by the Income Tax Settlement Commission and the Commissioner of Income Tax in his rule 9 report. Therefore, we are of the considered view that on this count also, the addition made by the AO cannot be sustained. The Id. CIT(A) after considering relevant facts, has rightly deleted additions made by the AO towards contract charges paid to M/s Metcon India. We do not find any error or infirmity in the findings of the Id. CIT(A) and hence, we are inclined to uphold findings of the Id. CIT(A) and direct the Id. AO to

delete additions made towards contract charges amounting to Rs. 34,08, 96, 156/-.

15. The next issue that came up for our consideration from ground no 2 and 3 of assessee appeal is disallowances of compensation to ex-partners and salary and wage expenses. The Id. AR for the assessee has not seriously contested the additions. Even otherwise, the Id. AO as well as the Id. CIT(A) had recorded categorical findings that compensation paid to ex-partners for settling dispute among themselves has not been incurred wholly and exclusively for the purpose of business. Settling personal disputes by paying out of funds of the firm cannot be considered as expenditure incurred wholly and exclusively for the purpose of business. The fact that claims was allowed in earlier year does not ipso facto lead to a conclusion that the same shall be allowed in subsequent years. For above reasons, we do not find any reasons to interfere with findings of the Id. AO as well as the Id. CIT(A) and hence, we confirm addition made towards compensation to ex-partners. In so far as salary and wages is concerned, the Id. CIT(A) has recorded a clear findings that the assessee did not furnished any cogent evidences to prove payment of salary to huge number of employees, when there is no business activity after sale of land at Nagpur. Mere submitting

PAN and other details of employees and deduction of TDS alone would not sufficient enough to prove payment of salary. Facts remain unchanged. The Id. AR for the assessee did not controvert findings recorded by the Id. AO as well as the Id. CIT(A) with any cogent evidences. Therefore, we are of the considered view that there is no error in the findings of the Id. CIT(A) and hence, we are inclined to uphold order of the Id. CIT(A) and confirmed additions made by the AO towards salary and wages.

16. In the result, appeal filed by the Revenue in ITA.No.1381/Mum/2018 is dismissed and appeal filed by the assessee in ITA No.1568/Mum/2018 is partly allowed.

Order pronounced under Rule 34(4) of Income Tax Rules 1963, through notice to parties on this: 12 /06/2020

Sd/-

(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-

(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated: 12/06/2020
Self Typed

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.

4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai