IN THE INCOME TAX A PPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

SMT. P. MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

ITA No. 1034/Hyd/2016
Assessment Year: 2007-08

Asst. Commissioner of Income-tax, Central Circle – 3(2), Hyderabad.	vs.	IL & FS Engineers & Construction Co. Ltd., Hyderabad. PAN – AABCM 3722 F
Appellant		Respondent

C.O. No. 42/Hyd/2016 (In ITA No. 1034/Hyd/2016)
Assessment Year: 2007-08

IL & FS Engineers & Construction Co. Ltd., Hyderabad. PAN – AABCM 3722 F	vs.	Asst. Commissioner of Income-tax, Central Circle – 3(2), Hyderabad.
Appellant / Cross Objector		Respondent

Revenue by: Shri R.S. Arvindakshan, DR
Assessee by: Shri K.C. Devdas

Date of hearing: 27/01/2020
Date of pronouncement: 09/06/2020

O R D E R

PER SHRI A. MOHAN ALANKAMONY, A.M.:

These appeals are filed by the assessee as well as the Revenue against the order of CIT(A) – 1, Hyderabad in appeal No. 0279/CC-3(2)/CIT(A)-11/13-14/14-15 passed U/s. 143(3) r.w.s 147 & 250(6) of the Act dated 22/03/2016 for the AY 2007-08.

2. The Revenue has raised three substantial grounds in its appeal; however, the crux of the issue is that the Ld. CIT (A) has erred in deleting

the addition made by the AO of Rs. 1,78,43,041/-, on account of the expenditure incurred on temporary structures by the assessee for non-production of bills.

3. The assessee has raised several grounds in its cross appeal however, the cruxes of the issues are that: -

(i) the Ld. CIT (A) has erred in upholding the reopening of the assessment U/s. 147 and 148 of the Act by the Ld.A.O.

(ii) the Ld. CIT (A) has erred in confirming the addition of Rs. 1,83,08,601/- made by the Ld. AO being provision for sub-contract expenditure claimed as deduction in the P & L Account by the assessee.

4. Brief facts of the case are that the assessee is a Limited company engaged in the business of construction, e-filed its return of income for the AY 2007-08 on 27/10/2007 declaring total income of Rs. 62,38,09,016/-. The Return of Income was initially processed U/s 143(1) of the IT Act on 17/02/2009 determining refund of Rs. 5,28,63,254/-. Subsequently, the case was selected for scrutiny and notices U/s. 143(2) and 142(1) were issued and served on the assessee calling for information/accounts/documents relevant for assessment. Special Audit U/s. 142(2A) of the Act was also conducted in the case of the assessee because the tainted Chairman of M/s. Satyam Computers Services Ltd., was deeply involved with the assessee Company and various frauds were unearthed. In response to the above notices, the ld. AR of the assessee furnished information as called for. Thereafter the Ld.A.O completed the reassessment U/s 143(3) of the IT

Act on 28/07/2010 determining an income of Rs. 68,47,97,450. Subsequently information was received by the Revenue from the office of the Ld.CIT, Cuttack that one of the sub-contractor of the assessee had not received payment from the assessee for Rs.1,83,08,601/- against which the assessee had claimed deduction. Hence once again the case was reopened U/s.147 of the Act and reassessment was completed on 28/03/2013 by making additions on two counts amongst which one of the issue is disallowance of 25% of the expenditure incurred towards constructions of temporary structure due to certain defects in bills with respect to labour, hire charges of vehicles and machinery and the other addition being the amount of Rs. 1,83,08,601/- claimed as expenditure in the P & L Account by the assessee when it is only provision for expenditure towards payment due to sub-contractors.

Revenue's Appeal

5. During the course of re-assessment proceedings, the Ld. AO directed the assessee to produce vouches in support of the claim of 100% depreciation on temporary construction expenses of Rs. 7,13,72,165/-. On perusal of vouchers/copies of vouchers produced by the assessee, the Ld. AO noticed that many of the invoices, particularly those of labour bills, hire charges of vehicles and machinery were self-made. A few of the defective invoices/bills were listed in para 6 of his order. When queried about the self-made and defective vouchers, it was replied that in the field of construction business it was not possible to keep/maintain printed invoices for labour bills and hire charges of vehicle and machinery. It was also stated by the assessee that the original invoices/bills for the FY 2005-06 sic 2006-

07pertaining to the relevant assessment were not traceable. Since the assessee had failed to maintain proper authentic documents to support the expenditure incurred by it the Ld.AO made addition by disallowing 25% of the expenditure incurred towards temporary construction of Rs. 7,13,72,165/- which worked out to Rs. 1,78,43,041/-. Aggrieved by the order of Ld. AO, the assessee preferred an appeal before the CIT(A). On appeal, the Ld. CIT(A) deleted the same on the ground that the addition made by the Ld.AO does not have an independent and sustainable basis, it is not the case of the Ld.AO that the expenditure could not pertain to the respective site or that the cash was siphoned out of the Company and further the sample size adopted by the Ld. AO is woefully inadequate to permit any reasonable conclusion against the assessee. Aggrieved by the order of CIT(A), the revenue is on appeal before us against the deletion of the addition of Rs. 1,78,43,041/-.

6. At the outset, the Ld. DR submitted before us that the assessee is unable prove its claim of expenditure towards construction by way of proper vouchers/bills and some of the bills submitted by the assessee are self-made and not verifiable. It was therefore pleaded that the Ld. AO had rightly made the additions by disallowing 25% of the expenditure incurred towards construction because the evidence adduced for incurring the expenditure was inadequate and there was scope for the assessee to inflate the expenditure.

7. The Ld. AR, on the other hand, submitted that in the field of assessee's business, it is not possible to obtain printed invoices from the

labourers and other petty service providers who provide vehicles and machinery on hire. The Ld. AR further submitted that the Ld. AO was convinced that expenditure towards temporary construction was incurred by the assessee but his only grievance was that adequate and authentic vouchers were not fully furnished and therefore he made the additions based on presumption. The Ld. AR further submitted that the ld. CIT (A) after analysing the issue had rightly concluded that the assessee had genuinely incurred the expenditure and accordingly deleted the addition. It was therefore pleaded that the order of the Ld. CIT (A) may be confirmed on the issue.

8. We have heard the rival submissions and carefully perused the materials on record. From the facts of the case and from the submissions of the assessee it is obvious that they have categorically admitted, in the field assessee's business of construction it is not possible to accurately maintain all the bills and vouchers. However only based on such admission of the assessee we are of the view that it cannot be simply presumed that the assessee has inflated the expenditure. However, on perusing the P & L Account of the assessee (Page No.91 of paper book), we find that the net profit earned by the assessee is only 12.3%. Further, from page No.79 to 83 of the paper-book it is apparent that the assessee is in the business of Hi-tech construction wherein the profit margin is usually quite high. Considering these facts and circumstances of the case, we are of the considered view that estimation of the disallowance of expenditure by the Ld. AO for want of proper bills and vouchers is justifiable, however, 25% of

the disallowance of the relevant expenditure appear to be on the higher side. Therefore, the finding of the Ld. CIT (A) cannot be accepted in toto on this issue. Keeping in view of these facts, in the interest of Justice for both the parties we find it appropriate to sustain the disallowance at 15% of the expenditure incurred of Rs. 7,13,72,165/- which works out to Rs. 1,07,05,825/-. Accordingly, addition of Rs. 1,07,05,825/- is sustained.

<u>Assessee's Cross Objection</u>

9. **<u>Ground No.1: Reopening of assessment U/s. 147 & 148 of the Act:</u>**

The assessee has challenged the reopening of the assessment U/s. 147 & 148 of the Act for the first time before the Ld. CIT (A) by raising the following objections: -

(i) Reasons recorded are not germane to the assessment eventually made and no specific charges have been framed against the company.

(ii) The original assessment having been made after scrutiny U/s. 143(3), reassessment must be based on information in the AO's possession that bears a live link with the reasons recording his satisfaction to the effect that taxable income of the year has escaped assessment;

(iii) There can be no finding of escapement of income on any of the counts recorded by the AO.

(iv) Initiation of re-assessment after four years from the end of the assessment year is sustainable only when the deficiencies noticed can be attributed to any omission on the part of the company to make a true and full disclosure of material facts.

(v) In the present case, the primary facts were all before the AO at the time of the original assessment.

(vi) Reliance placed on judicial precedents such as ITO vs. Lakmani Mewaldas 103 ITR 437 (SC) [materiality of information in the possession of the AO], CIT vs. Kelvinator of India Ltd 320 ITR 561 (SC) [distinction between power to reassess based on tangible and the power of the review, and the prohibition against change of opinion], Indian oil corporation vs. ITO 159 ITR 956 (SC) [reason to believe is different from reason to suspect].

9(i). On examining the issue, the Ld. CIT (A) arrived at the following findings while framing his Order: -

(i) The reasons were duly recorded by the Ld. AO and the same is not in dispute.

(ii) The assessee company was closely connected with Satyam Group of companies wherein various frauds were unfolded.

(iii) Para 6 of the reasons recorded stated that the claim of depreciation @ 100% on the temporary construction of Rs. 7,13,72,165/- is without basis.

(iv) As per the information received from CCIT, Cuttack it was revealed that M/s. S.K. Pradhan RF, Pradeep, one of the sub-contractors of the assessee had not received the payment of Rs. 1,83,08,601/- from the assessee though the assessee had debited the same as sub-contract expenses and claimed it as deduction in the P & L Account.

(v) The above-mentioned reasons for reopening of assessment were obtained based on the specific information received by the Revenue.

(vi) The notice for reassessment was issued within the threshold period of 4 years from the end of the relevant assessment year.

9(ii). Based on the above observation, the Ld. CIT (A) opined that the reopening of the assessment by the Ld. AO is appropriate and the decision relied by the Ld. AR are not relevant.

9(iii). Before us, the Ld. AR argued vehemently stating that the reopening of the assessment made by the ld. AO is bad in law. He further submitted that the assessee's case was already reopened once and assessment was completed after thorough examination. Hence it was argued that re-examining the same issues once again was not warranted and any contrary view would amount to change of opinion and that is not permissible as per law. He further relied on the following case laws:-

(i) Delhi High Court in the case of CIT vs. Jet Airways (P) Ltd, 331 ITR 236;

(ii) Mumbai High Court in the case of CIT vs. ICICI Bank Ltd., 47 (1) ITCL page 558;

(iii) Gujarat High Court in the case of PKM Advisory Services (P) Ltd., vs. ITO reported in 339 ITR 595;

(iv) Gujarat High Court in the case of CIT vs. Mohmed Juned Dadani reported in 355 ITR 171

9(iv). After hearing both sides, we do not find any merit in the submission of the Ld. AR. It is an admitted fact that the reasons for reopening were recorded by the Learned Revenue Authorities based on the information gathered by the Department. Therefore fresh materials against the assessee has surfaced wherein it was necessary to reopen the assessment in order to protect the Revenue from escapement of tax. The reasons for reopening were also furnished to the assessee. Though it may not be relevant, it is pertinent to mention that neither the assessee nor its AR disputed the merits of reopening the case before the Ld. AO. Further, apparently, the discrepancy noticed by the Ld. Revenue Authorities appears to be genuine and is required to be revisited in order to curtail escapement of income from being taxed. It is also pertinent to mention that the Revenue had stepped upon incriminating evidence against the assessee from its counterparts. Further, the Hon'ble Kerala High Court in the case of Innovative Foods Limited cited herein below it was held that where there is no discussion nor any finding regarding an issue in the earlier assessment, it cannot be presumed that the Assessing Officer had formed an opinion on the earlier occasion and hence any view on that issue by the Ld.A.O during the course of fresh assessment would not amount to change of opinion. Similar view was also held by the Mumbai Bench of the Tribunal in the case of Instant Holdings Limited cited hereinbelow after placing reliance in various decisions of the higher judiciaries. Further, the Hon'ble Karnataka

High Court in the case of Govindarajan reported in 377 ITR 243 it was held that the Ld. AO has powers to pass fresh assessment order with regard to the entire income which has escaped assessment in the re-assessment proceedings. Keeping in view of these facts and circumstance of the case, we hereby uphold the order of the Ld. CIT (A) on the issue of re-opening of assessment U/s. 147 & 148 of the Act. The citation of all the case laws relied by us are stated hereinbelow for reference: -

(i)Choksi Vachharaj Makanji & Co vs. ACIT [2016] 243 Taxman 465 (Gujarat);

(ii) Instant Holdings Ltd vs. DCIT [2014] 151 TTJ 137 (Mumbai);

(iii) Innovate foods Ltd vs. Union of India and others [2018] 409 ITR 415 (Ker.)

(iv) Hon'ble Karnataka High Court in the case of Govindarajan reported in 377 ITR 243.

10. **<u>Ground No.2: Disallowance of the provision made towards sub-contract expense for Rs. 1,83,08,601/-.</u>**

With respect to the issue regarding the confirmation of addition of Rs. 1,83,08,601/- by the Ld. CIT(A), the Ld. AR submitted before us that the assessee had entrusted sub-contract work to M/s SK Pradhan RF, Paradeep and provision was made for the payment for the contract. It was further submitted that the sub-contractor had partly executed the contract. Therefore, payment towards the sub-contract work was not made, however, provision for the expenditure incurred was created in the books of accounts and TDS was duly deducted as per the provisions of the Act. The Ld. AR further argued by stating that the assessee is following mercantile system of accounting and since the assessee had incurred the expenditure the same has to be debited to the P & L Account and accordingly claimed the same as deduction even though payment was not made during the relevant assessment year. However, on perusing the Order of the Ld.CIT(A) we find that in para no. 9.02 he has observed as follows: -

> "*9.02. it is clear from the assessee's submissions that there was a debit to the P & L Account attributable to the sub-contractor, M/s. SK Pradhan, Pradeep, which upon reconciliation, the assessee found necessary to reverse. To this extent, the taxable income of the company for the year is admittedly understated. Being so, there is nothing incorrect in the addition made by the AO. However, in so far as reversal of this debit can be established with reference to the accounts for the next assessment year consequential changes for assessment years would be in order. The Assessing Officer is directed accordingly.*"

10(i). From the above it appears that the assessee has admitted that no such expenditure towards sub-contract was incurred and accordingly in the subsequent year the entries were reversed. Therefore, the Ld. CIT (A) confirmed the addition made by the Ld. AO on this count and directed the Ld. AO to give consequential effect for the reversal of the entries in the subsequent year. Since complete facts are not clearly emerging from the orders of Ld. Revenue Authorities and contrary to the submissions the Ld.AR and further since the assessee has also not furnished sufficient particulars to establish their claim, in the interest of justice, we remit the matter back to the file of the Ld. AO for fresh consideration.

11. Before parting, it is worthwhile to mention that this order is pronounced after 90 days of hearing the appeal which is though against the usual norms, we find it appropriate taking into consideration of the

extra-ordinary situation in the light of the lock-down due to Covid-19 pandemic. While doing so, we have relied in the decision of Mumbai Bench of the Tribunal in the case of DCIT vs. JSW Ltd. In ITA No.6264/M/2018 and 6103/M/2018 for AY 2013-14 order dated 14th May 2020.

18. In the result, appeal of the Revenue is partly allowed and the Cross Objections of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on the 09th June, 2020

Sd/-	Sd/-
(P. MADHAVI DEVI)	(A.MOHAN ALANKAMONY)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 09th June, 2020.

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Copy forwarded to:

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2. *M/s IL & FS Engineering & Construction Co. Ltd.,(formerly Maytas Infra Limited), D. No. 8-2-120/113/3,4th Floor, Sanali Info Park, Road No. 2, Banjara Hills, Hyderabad.*
3. *CIT(A) - 11, Hyderabad.*
4. *Pr. CIT (Central), Hyderabad.*
5. *The DR, ITAT, Hyderabad*
6. *Guard File*