आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA No	Appellant	Respondent	A.Y
508/Hyd/2020	ACIT, Central Circle 3(2), Hyderabad.	Ascend Telcom Infrastructure (P) Ltd, Hyderabad PAN:AAECA2381H	2011-12
553/Hyd/2020	-do-	-do-	2012-13
554/Hyd/2020	-do-	-do-	2013-14
555/Hyd/2020	-do-	-do-	2014-15
509/Hyd/2020	-do-	-do-	2015-16
510/Hyd/2020	-do-	-do-	2016-17
556/Hyd/2020	-do-	-do-	2017-18
C.O 10/Hyd/2020 (508/Hyd/2020)	Ascend Telcom Infrastructure (P) Ltd, Hyderabad. PAN:AAECA2381H	ACIT, Central Circle 3(2), Hyderabad.	2011-12
C.O 12/Hyd/2020 (553/Hyd/2020)	-do-	-do-	2012-13
C.O 13/Hyd/2020 (554/Hyd/2020)	-do-	-do-	2013-14
C.O 14/Hyd/2020 (555/Hyd/2020)	-do-	-do-	2014-15
C.O 11/Hyd/2020 (509/Hyd/2020)	-do-	-do-	2015-16

Revenue by:	Shri Rajendra Kumar, CIT(DR)
Revenue by:	Shri K.R. Vasudevan, Advocate
Date of hearing:	26/10/2022
Date of pronouncement:	30/11/2022

O R D E R

PER BENCH:

These appeals filed by the Revenue are directed against the common orders dated 31.07.2020 of the learned CIT (A)-11, Hyderabad relating to A.Ys.2011-12 to 2017-18, respectively. The assessee also filed cross objections for the A.Ys 2011-12 to 2015-16. Both the Revenue and assessee raised identical grounds in the above appeals, therefore, the grounds raised by the Revenue for the A.Y 2012-13 in ITA No.553/Hyd/2020 is taken as a lead case and the grounds raised therein is reproduced below:

> *"1. The ld.CIT(A) erred both in law and on facts of the case in allowing relief to the assessee.*
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> *2. The ld CIT(A) erred in deleting the disallowance of Rs.12,40,36,185/- towards Operating & Maintenance expenses, when the Assessing Officer has clearly mentioned in the assessment order that during the search and post-search enquiries the appellant failed to furnish all the bills/vouchers, hence a detailed show cause notice was issued to the assessee company wherein all the facts relating to the bogus/accommodation entries of purchase bills/unexplained & unverifiable expenses with various vendors have been pointed.*
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> *3. The ld CIT(A) erred in deleting the addition of Rs. 4,54,98,600/- towards unexplained work-in-progress capitalized in books without appreciating the fact that a detailed show cause notice was issued covering the issues of search involving claim of non-genuine/bogus purchases/ unexplained & unverifiable expenses, as applicable to various vendors as noticed during the search and survey proceedings conducted in the group cases.*
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> *4. The ld CIT(A) erred in not following the principle laid down by the jurisdictional High Court of Andhra Pradesh in the case of Gopal Lal Bhadruka vs DCIT 346 ITR 106, wherein it has held that for the purpose of section 153A/153C of the IT Act the AO can take into consideration material other than what was available during search and se1zure operation for making an assessment.*

5. The Id CIT(A) is not justified on facts and in law in deleting the addition . ignoring the decision in the case of EN Gopa Kumar Vs CIT(2016) wherein it was held that the presence of incriminating material is not a requirement and the assessment u/s i53A can be made without there being any incriminating material.

6. The Ld.CIT{A) erred in deleting the addition of Rs.8,79,00,000/- towards provision for "site restoration costs" without appreciating the facts brought on record by the Assessing Officer that the assessee failed to justify the provision made.

7. The Ld.CIT(A) erred n deciding the issue in favour of the assessee without actually verifying the reasonable certainty of the "site restoration costs" and without referring the natter for remand proceedings for verification.

8. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary which may be necessary."

2. With regard to the cross objections raised by the assessee, the assessee did not press cross objections and requested for withdrawal of the C.Os. Accordingly, all the cross objections filed by the assessee are treated as withdrawn and dismissed. Ld. AR for the assessee had made endorsement to that effect in the files of CO.

3. In ground of appeal No.1, the Revenue is aggrieved with the issue of disallowance of Rs.12,40,36,185/- towards operational and maintenance expenses. In this regard, the learned DR drew the attention of the Bench to the assessment order wherein the Assessing Officer adjudicated the issue in Para 4 to the following effect:

"4.0 (i) Site maintenance charges and repair and maintenance expenses involving labor works, earth works etc., claimed under head operating expenses in P&L account Search and post search enquiries revealed that assessee has involved in claiming site maintenance expenses for site security charges and manpower costs etc. along with repairs and maintenance charges claimed under head operating/maintenance expenses and were perused during search for necessary reconciliation of such claim of

expenses in P&L a/c with etc. Accordingly supporting bills/vouchers during the search, assessee company was asked to submit bills/vouchers and other relevant supporting ledger extracts etc as applicable in support of the assessee's clam of huge expenses under civil work/ labour wok expenses for maintenance, repair and manpower related payment proofs as applicable for F.Ys 2009-10 to 2014-15. With reference to this assessee could not submit all bills and vouchers for necessary verification/ reconciliation with relevant vouchers and ledger extracts explaining the various sites involved in incurring such expenses of repair and maintenance involving unskilled labor with earth works, security supervision etc. As assessee could not submit all the details as sought in search and post search proceedings, a detailed show cause letter was issued to the assessee to submit the same in full as applicable a per 1.T.Act as claimed in the Return of Income applicable for Asst. Year 2010-11 to 2016-17.

With reference to this, assessee could not submit all details as required to reconci1le with the P&«L account and relevant ledger extracts, sites/project wise with supporting groupings of relevant expenses falling under these heads. On this assessee stated that each Site-wise/Project Wise ledger extracts and each minor and major head wise civil works bills/vouchers are not readily reconcilable to submit in the desired fashion/reconciliation to verify all civil works and related labor expenses involving various security, repair and maintenance payments etc., as incurred in security, erection, supervision and maintenance of structures involving these works. However, assessee strongly contended all these as indeed expenses incurred in full at various sites involving labor charges, erection and site repair charges and related earth works and could and submit/made available few bills vouchers for perusal and verification as pertains to part of few months. Further, assessee contended these involve huge expenses covering huge data involving various bills and vouchers of minor expenses grouped under each site/project expenses so as to arrive at total expenses as claimed. On perusal of certain bills/vouchers as made available, it is noticeable that some of them are improperly vouched without full details such as address, recipient name, payee signature and name, full description oi maintenance/ security work involved, repairs undertaken and so on and so forth making it not amenable for complete verification with proper reconciliation of such expenses under different sites/projects undertaken by assessee during the year. Accordingly considering all these discrepancies of improper vouching coupled with non-reconciliation of each item of bills vis-à-vis each claim of expenses under these heads, it would be difficult to consider entire expenditure as claimed as supported with proper bills and vouchers as debited in P&L account. Considering these

discrepancies to meet the ends of justice, keeping in view of assessee's facts of case, nature of business of telecommunications having substantial erection sites involving labor expenses partly expenses of Rs.62,01,80,926/- as claimed for the Asst. Year 2012-13 under the incurred in cash etc, it is just and reasonable to disallow 20% of total head Site maintenance and repair charges/expenses and same comes to Rs.12,40,36,185/- is disallowed as expenses attributable to inflation of expenditure under various expenditures involving civil works bills, earth works, transportation and installation works etc. Addition: Rs. 12,40,36,185 /-.

Penalty proceedings u/s. 271(1)(c) are initiated separately for submission of inaccurate particulars of income".

4. The learned CIT (A) while dealing with the issue had deleted the addition of 20% of the total amount confirmed by the Assessing Officer by holding as under:

"5. I have considered the assessment order and submissions of the appellant. It is seen that the addition made by the Assessing Officer is not based on any material seized during the course of search. Apparently there is no finding as to inflation of expenses or debiting bogus expenditure by the appellant company. Further, it is seen that the appellant maintains vouches etc at various placed and on sample basis evidences were produced before the Assessing Officer. There is no specific adverse finding of the Assessing Officer. The observations are general without pointing out any specific deficiencies The appellant is a corporate which is owned/run under professional management. The estimated disallowance @20% has no basis. Considering the above, it is held that no addition is warranted and the addition is deleted".

5. Before us, the learned DR submitted that the assessee has not produced supporting bills and vouchers for verification and reconciliation before the Assessing Officer and further the bills etc., which were produced before AO were not in the manner of disclosing all the details of the expenses carried out by the assessee. He relied upon the order of AO.

6. Per contra, the learned AR submitted that all the necessary vouchers and bills were duly examined by the Assessing Officer in the original assessment proceedings and subsequently, the same was also examined by the Assessing Officer in the 153A proceeding. It was further submitted that once the books of account have not been rejected by the Assessing Officer, therefore, it will not be in accordance with law to disallow 20% of the expenditure claimed by the assessee. The Assessing Officer failed to point out which vouchers/bills were not available with the assessee and what is the basis of disallowing 20% of the total expenditure. He relied upon the written submissions filled in this regard.

6.1. It was submitted by the assessee in the written submissions as under :

"2.1.1. The following expense forms part of operating and maintenance expense debited to profit and loss account for FY 2013-14;

Particulars	**Amount (Rs.)**	**Amount** (Rs.)
Lease Rent		28,63,16,416
Operating and Maintenance Agency Charges		3,93,34,740
Site Maintenance Charges		10,70,46,389
Site security charges		6,12,59,970
Outsourced Manpower Cost		11,72,44,384
Power and fuel	1,38,98,37,717	- 2,12,62,780
Less: Amounts recovered from customers	1,41,11,00,497	
Less: Capitalised		- 11,53,868
Total		**58,87,85,251**

2.1.2. The learned AO has disallowed 20% of aforesaid expenditure on ad hoc basis stating that the same is attributable to inflation of expenditure along with the following reasons;

Name and address of the recipient and signature of payee is not mentioned in the sample invoices submitted; Full description of maintenance/security work involved, repairs undertaken is missing in some of the sample invoices

Order of the learned CIT(A)

2.1.3. The learned CIT(A) after the examining the details submitted before the learned AO held that Appellant maintains the vouchers etc at various places and on sample basis evidences are produced before the AO and there is no specific adverse finding of the AO.

The learned CIT(A) observed that the Appellant is a corporate which is owned/run under professional management and the estimate disallowance at 20% has no basis. Accordingly, the learned CIT(A) deleted the adjustment proposed by the AO.

2.1.4. The Revenue has now raised a ground before your goodself against the deletion of the disallowance made by stating that in absence of the Appellant to furnish all the bills/vouchers, a detailed show cause notice was issued wherein facts relating to bogus/ accommodation entries of purchase bills/unexplained and unverifiable expenses with various vendors have been pointed.

2.2. Submission

We wish to provide our detailed submission as below against the ground raised by the Revenue in connection with the disallowance of the operating and maintenance expenses:

2.2.1. The learned AO has disallowed 20% of total expense on ad hoc basis and the ground raised by the Revenue that the bogus/ accommodation entries of purchase bills/unexplained and unverifiable expenses with various vendors have been pointed in a show-cause notice is erroneous.

The disallowance made by the learned AO is not based on any specific finding and is devoid of appreciation of the details submitted by the Appellant.

2.2.2. In this regard, we wish to submit that during the assessment proceedings the Appellant had carried several files containing invoices in relation to operating and maintenance expense for 7 Assessment years to the office of the learned AO and sample invoices from such files has been verified by the learned AO on a random basis. We further submit that the sample invoices were chosen by the learned Assessing Officer from the files.

2.2.3. As your goodself may observe from the invoices submitted before the learned AO, the details regarding name of recipient, their address, full description of work undertaken is duly available in the invoices.

Further, the invoices are also supported with proper purchase orders and goods receipt note etc. which clearly captures the nature of expenses and vendors to whom the said expenses were paid.

The learned AO has merely stated that the invoices are incomplete without careful examination of the invoices and as van be seen from the invoices there are no discrepancies as alleged by the learned AO and hence, the finding of the learned AO is erroneous and against the facts/ materials available on record.

However, after putting in the best possible efforts, the Appellant has duly submitted sample invoices along with the ledger extracts of operating and maintenance expense for the relevant assessment years before the learned AO.

2.2.4. Reliance is placed on various judicial precedents wherein it was held that expense cannot be disallowed on adhoc basis. The crux of the judicial precedents in this regard is captured below;

The officer is not allowed to make disallowances as per his whims based on wrong conclusions drawn. Prima-facie, the assessing officer is required to point out the defects in the books and not merely make token disallowances based on surmises and conjectures, devoid of any merits.

The ad hoc disallowance of expenses is not permitted under the law. The tax officer is required to properly examine the books of account and demonstrate as to why an expenditure shall not be admissible to the assessee.

Where perusal of nature of expenses indicates that the same were part and parcel of the costs incurred in connection with the business of the assessee, disallowance of the same on ad hoc basis is incorrect.

Therefore, expenditure incurred in the ordinary course of business, which is deductible under the provisions of the Act, shall not be disallowed on ad hoc basis without full and proper examination of the books of accounts.

·Where the tax officer has not rejected the books of accounts and similar nature of expenses were allowed in the past scrutiny assessments, disallowance made on ad hoc basis is not tenable.

The tax officers ought to place reliance on the audited financial statements, certified as true and fair by the statutory auditors after due verification of the deductions claimed by the assessee in the profit and loss account with the books of accounts.

A summary of the judicial precedents outlining the above principles is provided vide Annexure 2 for kind reference of your goodself. Further the learned AO disallowed the expense without carefully examining the documents furnished during the proceedings. "

7. We have heard the rival contentions and perused the material available on record. We find that the AO in the instant case, had disallowed 20% of the site maintenance and repair charges amounting to Rs.12,40,36185/- on the ground that assessee could not substantiate with evidence to his satisfaction by producing relevant bills and vouchers and could not reconcile each item of bills vis a vis each claim of expenses under this head. We find that the learned CIT(A) deleted the addition, the reasons of which have already been reproduced in the preceding paragraphs. It is the submissions of the ld. DR that when assessee failed to produce the bills/ vouchers to the satisfaction of the AO in search proceedings and could not reconcile each item of bills vis a vis each claim of expenses under the head site repair and maintenance, the ld.CIT(A) was not justified in deleting the disallowance. Ld. DR had further submitted that the AO had not examined this aspect in the original proceedings as claimed by the AR for the assessee. Per contra, it is the submission of the ld. AR that the assessee is a reputed company and was maintaining proper bills and vouchers. It is his submissions that AO, without pointing out any specific instance had disallowed 20% of the expenses on ad-hoc basis which is not justified. Hence CIT(A) had rightly deleted the disallowance made by AO.

8. We have considered the issue in the light of the argument made by both sides. We find the Assessing Officer in the instant case while making the ad-hoc disallowance has given the following finding.

> *"With reference to this, assessee could not submit all details as required to reconci1le with the P& L account and relevant ledger extracts, sites/project wise with supporting groupings of relevant expenses falling under these heads. On this assessee stated that each Site-wise/Project Wise ledger extracts and each minor and major head wise civil works bills/vouchers are not readily reconcilable to submit in the desired fashion/reconciliation to verify all civil works and related labor expenses involving various security, repair and maintenance payments etc., as incurred in security, erection, supervision and maintenance of structures involving these works. However, assessee strongly contended all these as indeed expenses incurred in full at various sites involving labor charges, erection and site repair charges and related earth works and could and submit/made available few bills / vouchers for perusal and verification as pertains to part of few months. Further, assessee contended these involve huge expenses covering huge data involving various bills and vouchers of minor expenses grouped under each site/project expenses so as to arrive at total expenses as claimed. On perusal of certain bills/vouchers as made available, it is noticeable that some of them are improperly vouched without full details such as address, recipient name, payee signature and name, full description oi maintenance/ security work involved, repairs undertaken and so on and so forth making it not amenable for complete verification with proper reconciliation of such expenses under different sites/projects undertaken by assessee during the year. Accordingly considering all these discrepancies of improper vouching coupled with non-reconciliation of each item of bills vis-à-vis each claim of expenses under these heads, it would be difficult to consider entire expenditure as claimed as supported with proper bills and vouchers as debited in P&L account. Considering these discrepancies to meet the ends of justice, keeping in view of assessee's facts of case, nature of business of telecommunications having substantial erection sites involving labor expenses partly expenses of Rs.62,01,80,926/- as claimed for the Asst. Year 2012-13 under the incurred in cash etc, it is just and reasonable to disallow 20% of total head Site maintenance and repair charges/expenses and same comes to Rs.12,40,36,185/- is*

disallowed as expenses attributable to inflation of expenditure under various expenditures involving civil works bills, earth works, transportation and installation works etc. Addition: Rs. 12,40,36,185 /-."

It is the settled position of law that for claiming any expenditure as allowable expenditure, the onus is always on the assessee to substantiate with evidence to the satisfaction of the AO by producing relevant bills and vouchers with supporting documents that the expenditures were actually incurred, which were relatable to the business of the assessee. It is also settled position of law that the AO, without pointing any specific instance of non production of bills / vouchers etc can not disallow the expenditure on ad-hoc basis especially when the assessee's accounts were duly audited and the auditors had not pointed out any specific discrepancy in the bills/ vouchers of the assessee. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue de-novo to the file of AO with a direction to verify each and every bills and voucher and make only specific addition where he finds that the assessee failed to substantiate the expenditure by producing necessary evidence to his satisfaction. In our opinion, the AO can not make any ad-hoc disallowance without pointing out the specific instances i.e AO can disallow the expenditure on actual basis, in case assessee failed to produce the evidence in support of its case. Needless to say the AO shall decide the issue as per fact and law after following the principle of natural justice. We hold and direct accordingly.

9. So far as the decision relied on by the learned counsel for the assessee in the case of R.G.Buildwell Engineers Ltd. 99 taxmann.com 284 is concerned, we find that in the said case, the books of accounts of the assessee were not rejected and it was also the case that in the past consistently such expenses were allowed in the scrutiny assessment. In our opinion, the said decision is not applicable as the case in hand is a search assessment where the material was found showing the unexplained expenditure incurred by the assessee. In the search proceedings it was mentioned that the assessee failed to substantiate the expenditure mentioned in the bills / vouchers. Similarly, the decision in the case of I.I.C. Systems 44 taxmann.com 169 is also not applicable to the facts of the case on hand as in the present case, the Assessing Officer has brought on record the discrepancy in the bills and vouchers on test check basis. However, he has failed to quantify the expenditure which is required to be disallowed in the absence of supporting bills / vouchers / evidence. Hence, the ground raised by revenue is allowed for statistical purposes.

10. Ground No.2 raised by the Revenue is with respect to deleting the addition of Rs.4,54,98,600/- towards unexplained work in progress. In this regard the learned DR drew the attention of the Bench to Para 4.2 of the assessment order which read as under:

"4.0(ii) Disallowance of unexplained work-in-progress capitalized in books as claimed.

Further, during the verification of similar expenses as above as claimed under capital work-in-progress as attributable to tower erection etc., assessee was requested to give all supporting proofs of expenses claimed under capital work-in-progress for A.Ys 2010-11 to 2016-17 as claimed as under for all these years in books of account:

S.No	A.Y	*Amount claimed/ reflected in books etc.*
1	2010-11	*15,46,30,082*
2	2012-13	*4,54,98,600/- (inclusive of opening balance of capital work-in-progress as attributable to A.Y 2011-12 capitalized during this year for Rs.20,80,278*
3	2013-14	*1,50,09,665*
4	2014-15	*96,28,868*

11. The learned DR thereafter drew the attention of the Bench to the order passed by the learned CIT (A) wherein the learned CIT (A) by a cryptic, unsubstantiated and non-speaking order has allowed the claim of the assessee:

"6.2 1 have considered the assessment order and submissions of the appellant. The AO has made addition disallowing the amount of additions to capital work in progress (CWIP) during the year. The addition on account of CWIP cannot be made under the provisions of I. T Act, 1961. There is no finding of the AO that no work was executed on capital work in progress as The only ground of AO is that vouchers are not produced. As there is no debit of amount to P&L account, no addition is warranted. As there is no adverse finding also as to source of funds for such claimed by the appellant. capital expenditure made by the appellant; no addition is warranted as contended by the appellant. Accordingly, the addition is deleted The appellant succeeds on this ground."

12. It was the contention of the learned DR that the capital work in progress can only be allowed by the Assessing Officer if the assessee shows the evidence of the actual expenditure incurred for raising the capital assets. Nothing has been brought on record by the assessee during the course of assessment proceedings. Therefore, the contention of the learned DR is that the deletion made by the learned CIT (A) is without any basis.

13. Per contra, the learned AR submitted that sufficient information and documents were provided by the assessee. It was also the contention of the learned AR that once the expenditure has not been routed through P&L A/c, no addition can be made by the Assessing Officer. He also submitted written submission to this effect which reads as under:

> *"3.1. Facts of the case*
>
> *3.1.1. The Appellant is into the business of providing passive telecom infrastructure and capitalizes the portion of certain expenditures in relation to operating and maintenance expense, interest expense etc. whenever a new tower comes into existence.*
>
> *3.1.2. For the previous year 2013-14 relevant to Assessment Year 2014-15, the Appellant has capitalized certain portion of operating and maintenance expense and other expenses amounting to Rs. 96,28,868.*
>
> *3.1.3. The Appellant has not deducted TDS on the expenditure amounting to Rs. 96,28,868. However, no disallowance were made under section 40(a)(ia) of the Act since no deduction was claimed while computing the taxable income in respect of capitalized work-in-progress (`CWIP).*
>
> *3.1.4. The learned AO has disallowed amount of Rs. 96,28,868 for the following reasons;*

- *Vouchers and bills were not made available to cross verify the genuineness of claim.*
- *Expenditure of capital nature is akin to investments and same needs to be justified with supporting sources and also due adherence to the provisions of the I.T. Act including the TDS, maintenance of supporting bills and vouchers etc.*

3.1.5. Further the learned AO contended that the genuine investment with explainable sources is neither verifiable nor has support of law.

Order of the learned CIT(A)

3.1.6. The learned CIT(A) after carefully examining the submissions by the Appellant during the appellate proceedings held that there are no findings of the AO that no work was executed on capital work in progress as claimed by the Appellant. As there is no debit to the P&L account no addition is warranted. Further as there is no adverse findings also as source of funds for capital expenditure made by the Appellant, no addition is warranted as contended by the Appellant. Accordingly, the learned CIT(A) has deleted the adjustment made by the AO.

3.1.7. The Revenue has raised a ground before your goodself against the deletion of the disallowance made by the learned CIT(A) that a detailed show cause notice was issued involving claim of non-genuine/ bogus purchases/ unexplained & unverifiable expenses as applicable to various vendors as noticed during the search and survey proceedings conducted in group cases.

3.2. Submission

We wish to provide our detailed submission as below against the ground raised by the Revenue in connection with the disallowance of the CWIP:

Unexplained investment

3.2.1. We submit that the learned AO has erred in contending the CWIP expense as unexplained investment and thereby, making the disallowance.

3.2.2. The unexplained investment are dealt in section 69 of the Act. The relevant provision of section 69 of the Act is reproduced below :

Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

3.2.3. Given the above, the Appellant wish to submit that the investment can be considered as unexplained investment only when they are not recorded in the books of accounts.

3.2.4. In the present case, CWIP was duly recorded in the books of accounts which was also disclosed in the balance sheet. Further, the learned AO disallowed the expenses based on the disclosure made in the audited accounts.

3.2.5. Therefore, the said amount duly recorded in the books of account cannot be considered as non-genuine/ as unexplained investment.

3.2.6. In this regard, the Appellant wishes to place reliance on various judicial precedents' wherein it was held that

- *under section 69, only such value of the investments may be deemed to be the income of the assessee for the financial year, if they are not recorded in the books of account.*
- *In the absence of any corroborative evidence establishing receipts and payments outside the regular books of account, it cannot be alleged that investments have been made which are not recorded.*
- *Unless it is first established beyond doubt that there is an investment which is not recorded by the Assessee in its books, no occasion to explain about the nature and source of the investment can arise. Summary of judicial precedents outlining above principles is enclosed vide Annexure 3.*

3.2.7. In view of the above, the Appellant wishes to submit that the contention of the learned AO to treat the CWIP amount as unexplained investment is not justified and devoid of merits.

Notwithstanding and without prejudice to the above,

3.2.8. The Appellant wishes to place reliance on the following judicial decisions which have held that an expenditure not claimed by the assessee in the Profit & Loss A/c cannot be disallowed:

The Hon'ble Hyderabad tribunal in the case of M/s Name Constructions (P.) Ltd. v. DCIT (Hyd - Trib.) ITA Nos.1462 &1463/Hyd/2011 held that "The contention of the assessee is that this item has not been debited to Profit & Loss A/c and this has been shown in the balance-sheet and it cannot be considered for allowance or disallowances. We find force in the contention of the assessee's counsel that unless the assessee claims this item as expenditure, the assessing officer cannot allow or disallow the same."

The Hon'ble Hyderabad tribunal in the case of M/s Aditya Housing and Infrastructural Development Corporation (P) Ltd v. Deputy CIT (Hyd - Trib.) ITA No. 959/Hyd/2013 has placed reliance on its ruling in the case of MIs Name Devesh Agarwal v. CIT, Rupee Finance & Management (P.) Ltd ACIT, CIT, Jodhpur v. Mehta Gwar Gum & Co, Aurobindo Sanitary Stores V. CTC Ascend Telecom Infrastructure Private Limited Constructions (P.) Ltd. v. DCIT (Hyd - Trib.) ITA Nos.1462 &1463/Hyd/2011 and held that if the amount not debited to profit&loss account the same cannot be disallowed

Non-availability of vouchers

3.2.9. The learned AO erred in stating that genuineness of expense could not be verified in absence of availability of voucher and failed to consider the fact that CWIP is capitalized out of operating and maintenance expense and other such expenditures incurred towards erection of tower.

3.2.10. In this regard, we wish to submit that the Appellant had submitted sample bills before the learned AO for operating and maintenance expense based upon which he has made disallowance to the extent of 20% of operating and maintenance expense.

The details furnished regarding operating and maintenance expense and submission of the Appellant are captured in Para 4 above.

Further, additional invoices towards the CWIP expense submitted before the learned CIT(A) also forms part of page 86 to page 106 of the paperbook.

3.2.11. In view of the above, the Appellant submits that the contention of AO that no evidence were furnished to justify claim is not correct.

3.2.12. We also submit that disallowance of capitalized portion of interest costs is erroneous given that the interest were paid to bank and financial institution and the same was also allowed as deduction under section 43B of the Act.

Non deduction of TDS

3.2.13. We wish to submit that the learned AO erred in disallowing the entire expenditure stating that TDS has not been deducted for the aforesaid payment for the subject assessment year without considering the fact that CWIP was not claimed as deductible expense while computing the taxable income.

3.2.14. In this regard, it is submitted that no disallowance is warranted under section 40(a)(ia) of the Act towards non deduction of tax at source on capitalized expenditure since the same is not claimed as deduction while computing the taxable income.

The disallowance under section 40 can only be made towards the expenditure which is claimed as deduction while computing income and cannot be made on capital expense as the same is not claimed as revenue expenditure."

14. We have heard the rival contentions and perused the material available on record. It is also the submission of the learned AR that if given an opportunity, the assessee is in a position to substantiate with evidence to the satisfaction of the AO regarding actual expenditure incurred for the raising the capital assets. Even in the written submissions filed before us, the assessee at Para 3.2.10 has categorically submitted as under :

"3.2.10 In this regard, we wish to submit that the Appellant had submitted sample bills before the learned AO for operating and maintenance expense based upon which he has made disallowance to the extent of 20% of operating and maintenance expense.

The details furnished regarding operating and maintenance expense and submission of the Appellant are captured in Para 4 above.

Further, additional invoices towards the CWIP expense submitted before the learned CIT(A) also forms part of page 86 to page 106 of the paper book."

15. Considering the totality of the facts of the case, the submissions of the assessee and also on account of fact that the ld.CIT(A) had passed a non-speaking, cryptic and perfunctory order without dealing with the objection of the Assessing Officer, had allowed the ground of the assessee, therefore, in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to grant one more opportunity to the assessee to substantiate its case by leading evidence to his satisfaction. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. Though, in the written submission, the ld.AR had

referred to certain decisions, those decisions are not applicable to the facts of the present case and moreover, none of these decisions were referred during the course of arguments before us. Accordingly, we allow the ground of the Revenue for statistical purposes and remand back the issue to the file of Assessing Officer.

16. Effective Ground No.6 is raised by the Revenue is regarding disallowance of Rs.8,79,00,000/- towards provision for "site restoration costs" without appreciating the facts brought on record by the Assessing Officer. The learned DR drew the attention of the Bench to Para 5.2 & 5.3 of the order passed by the Assessing Officer which read as under:

> *"5.2 Considering the above facts, it is noticeable that assessee has made similar claim for this A.Y. involving notional claim of provision. Hence, a detailed show cause was issued requesting information in detail along with re-working of quantum of claim made in Profit and Loss account/I.T. computation filed with Return of Income involving this issue of site restoration expenditure of provisional nature vide this office letter dated 10.04.2018. In response to same, assessee filed its submissions as called for vide its letter dated 04.05.2018. More or less reiterating the submissions made earlier For A.Y 2011-12 and A.Y. 2015-16.*
>
> *5.3 After careful examination of assessee's submissions and also keeping in view the disallowances made on this issue for other A.Y.s i.e AY 2011-12 and 2015-16, assessee's claim is not acceptable as per I.T. Act in view of following reasoning:*
>
> *It is a fact on record that this is a clear provision which is a set aside amount for incurring in future years in the event of site restoration cost likely or unlikely to be incurred in the event of abandoning any tower sides in the interest of business.*
>
> *It is a fact on record that assessee has not incurred any such expenditure till date and could not submit any bills and vouchers and plain reading of above note/ facts clearly establishes that assessee is conveniently creating a provision for future possible likely or unlikely liability*

and claiming the same as present year attributable expenditure.

This way of accounting/ claims are not allowable as per mercantile method of accounting read with the provisions of the I. T. Act as it isa mere provision which is neither accrued nor an ascertained liability and tantamount to skewed representation of Accounts.

Assessee's contention to treat as revenue expenditure is far stretched, devoid of merits and not entertainable as per provisions of I.T. Act. The citations relied upon by assessee are distinguishable on facts of case read with assessee's line of business activity etc and are no way relevant to the case on hand where in no such expenditure is incurred in the past and till date. Even certainty of incurring is also of remote possibility as per agreement clauses involving dismantling charges if any on such abandoning of tower sites is incurred under regular maintenance and repair works are duly taken care. Hence the balance likely expenditure if any is only to restore the site by earth fillings and stabilization of soil etc., if demanded by such owner on such likely constraints. Considering all these facts, assessee's reliance on various citations is no way relatable to assessee's line of business read with facts on hand. Hence all the Citations are distinguishable and are not applicable to assessee's case on facts and ratios of adjudication relied by assessee. It is an established law under the I.T. Act, no provision is allowable against an accrued income of this year and more so in the case of un-ascertained liabilities which are unlikely to occur in the near future. Hence, assessee plea is not acceptable on this count also.

5.4 In view of the above detailed discussion, assessee claims of site restoration cost of Rs. 8,79,00,000/- in the Audit report as discussed in detail as above is to disallowed as claimed mistakenly in the computation at correctly Rs.8,79,00,000/- as filed with the Return of Income and same is brought to tax as claimed for A. Y. 2012-13 . Addition: Rs.8,79,00,000/-

Penalty proceedings u/s. 271(1)(c) are initiated separately for submission of inaccurate particulars of income".

17. The learned DR has also drawn our attention to the findings given by the learned CIT (A) which is mentioned in para 7.2 of the order which reads as under:

> *"7.2 I have considered the assessment order and submission of the appellant. The ground on which the Assessing Officer made addition is that the appellant has made only provision and not incurred expenditure. The contention of the appellant is that the liability is incurred and it is certain. The claim is as per the mandatory accounting standards and income computation and disclosure standard (ICDS). The decision of the Hon'ble Supreme Court in the case of CIT Vs. Bharat Earth Movers Ltd (supra) and in case of M/s. Calcutta Co Ltd vs. CIT (Supra) are applicable t the facts of the case and are in favour of the appellant. Addition is not justified solely on the ground that the appellant has made provision. The Assessing Officer has not brought any material on record to show that the estimation of liability made by the appellant is incorrect or not genuine. Since the liability arose on a/c of lease deeds executed by the appellant and no finding by Assessing Officer to the contrary, the expenditure claimed by the appellant is allowable and the same is allowed. The addition made by the Assessing Officer is deleted. The appellant succeeds on the above ground".*

18. It was the submission of the learned DR that the term of the lease deed was for sufficient long time and therefore, site restoration charges cannot be allowed on provisional basis for making the provisions based on the actuarial as no site restoration expenditure was incurred by the assessee during the A.Y under consideration.

19. Per contra, the learned AR submitted that the assessee made provisions in terms of the standard accounting policy of income tax computation disclosure and therefore, based on the historic and empirical data. It was further submitted that the assessee has made reversal of the excess provisions made by the assessee in the subsequent A.Y and it was also the contention of the ld AR that sufficient information was provided by the assessee to the Assessing Officer for all these years. He also

submitted that the written submission which is to the following effect:

"Facts of the case

4.1.1. The Appellant is engaged in the business of providing passive telecom infrastructure services to telecom operators. Accordingly, the Appellant takes land- on lease for construction and erection of towers. Such towers are provided to the telecommunication companies with other passive telecom infrastructure.

4.1.2. As per the terms of land lease agreement with lessors, the Appellant is under obligation to restore the sites to its original position as it was before erecting the tower on vacating the site.

Accordingly, the Appellant estimates the expenses required to be incurred to restore the sites to its original position and provision is created for the same in the books as 'Site restoration expenses'.

4.1.3. The site restoration cost is estimated by the Appellant to include likely expenses to be incurred towards labor and material costs etc.

4.1.4. In the assessment order, the learned AO has disallowed the aforesaid expense as unascertained liability and contended as under;

It is a fact on record that this is a clear provision which is set aside amount for incurring in future years in the event of site restoration cost;

The Assessee has not incurred any such expenditure till date and is conveniently creating a provision for future possible liability and claiming the same as present year attributable expenditure.

This way of accounting/claims are not allowable as per mercantile method of accounting read with the provisions of the Act as it is a mere provision which is neither accrued nor an ascertained liability.

Assessee's contention to treat as revenue expenditure is far stretched, devoid of merits and not entertainable as per provisions of the Act.

Order of the learned CIT(A)

4.1.5. The Appellant subsequently filed appeal before the CIT(A) contesting the above disallowance, which was allowed by the CIT(A) in favor of the Appellant.

4.1.6. Aggrieved by the decision of the learned CIT(A), the Revenue has filed appeal before the Hon'ble Tribunal stating that the learned CIT(A) did not verify the reasonable certainty of the site restoration costs and not referring the matter for remand proceedings for verification.

4.2. Submission

4.2.1. We submit that the learned CIT(A) considered the submissions of the Appellant that the claim for deduction towards site restoration expenses is as per the mandatory accounting standards and Income Computation and Disclosure Standards.

Accordingly, the learned CIT(A) has held that provision created for site restoration cost is an ascertained liability.

Further, the learned CIT(A) observed that the learned AO had not brought any material on record to show that the estimation of liability as made by the Appellant is incorrect or not genuine and since the liability arose on account of the lease deeds executed by the Appellant and there was no finding by the AO to the contrary, the expenditure shall be allowed.

4.2.2. The learned CIT(A) also referred to the decision of Hon'ble SC in the case of CIT v. M/s. Bharat Earth Movers Ltd (2000) 112 Taxman 61 and M/s Calcutta Co. Ltd v. CIT [1959] 37 ITR 1 (SC), are applicable to the facts of the case are in favour of the Appellant.

Considering the above, the learned CIT(A) deleted the adjustment made by the learned AO.

In connection with the ground raised by the Revenue, we wish to furnish our detailed submission as below:

4.2.3. The Appellant wishes to submit that the provision for site restoration cost is created pursuant to lease agreement entered with the land owners during the year. The Appellant is liable to restore the site to original condition as per the terms of the lease agreement.

In this regard, sample copies of land license agreement with the landlord are enclosed vide page 107 to 126 of the paperbook for the kind reference of your goodself.

4.2.4. As can be seen from the agreements, before vacating the site, the Appellant is liable to restore the site to its original condition. Accordingly, when the Appellant enters into contract with landlord and commences erection of site, it is under an obligation to restore such land and thus liability to restore the site arises in the year of taking sites on lease. Accordingly, the Appellant has created provision towards the estimated expenses to be incurred in connection with restoration of sites.

Requirement of Companies Act

4.2.5. The Appellant is a company incorporated under the provisions of the Companies Act, 1956 and as per section 211 of the Companies, Act 1956 it is mandatory for the Appellant to follow the Accounting Standards prescribed under the Companies Accounting Standard Rules, 2006.

The Appellant has created provision for site restoration cost as per the provisions of Accounting Standard (AS) 29- Accounting for provisions, contingent assets and contingent liabilities notified by the Ministry of Corporate Assets vide Notification No. 1/3/2006/CL-V dated 07 December 2006 pursuant to the provisions of section 211(3C) of the Companies Act 1956.

4.2.6. As per AS 29, a provision is recognised when an enterprise has a present obligation as a result of past event, it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation in respect of which a reliable estimate can be made. The terms present obligation, probable event and reasonable certainty is defined as under;

"Present obligation" is an obligation if, based on the evidence available, its existence at the end of the previous year is considered reasonably certain.

The accounting standard 29 defines 'a probable event' outflow to mean an event which is more likely than not to occur.

Further, the provisions of the Act/ AS does not define the term 'reasonable certainty'. Accordingly one can place reliance on general parlance and judicial precedents to understand the meaning of reasonable certainty;

The Law Lexicon dictionary provides that "reasonable certainty" means "on a fair and reasonable construction may be called certain, without restoring to possible facts which do not appear". "Reasonable certainty" is the being free from "reasonable doubt"

The expression "reasonable" means what is just and fair [S. Raghbir Singh v. Sandhawalia v. CIT [1958] 34 ITR 719 (Punjab)] .

The Honourable Supreme Court held that "if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one".

<u>As per Income tax Act, 1961</u>

4.2.7. As per the provisions of section 145 of the Act, income chargeable under the head 'Profits and gains of business or profession' or 'Income from other sources' shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

4.2.8. Given that the Appellant is following mercantile system of accounting by adhering to the specific requirements under the Companies Act, 1956, the claim of site restoration provision made by the Appellant is based on the concept of

matching principle which is in accordance with of the provisions of section 145 of the Act.

Judicial precedents on allowability of provision:

4.2.9. The Hon'ble Supreme Court in the case of CIT v. Bharat Earth Movers2 held that if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability.

It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not

a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

4.2.10. Further, the reliance is also placed on the decision of the Hon'ble Supreme Court in case of Calcutta Co. Ltd. v. CIT3, wherein the assessee had purchased land and sold them in plots fit for building purposes undertaking to develop them. When the plots were sold, the assessee undertook to carry out the development within a stated period.

In its accounts, it debited an estimated sum as expenditure for the development that it had undertaken to carry out. This expenditure was disallowed. It was held by the Hon'ble Supreme Court that the undertaking to carry out development on the land imported a liability which accrued on the dates of the deeds of sale, though it was to be discharged at a future date. It was an accrued liability and estimated expenditure which would be incurred on discharging the same could be deducted from the profits and gains of the business. The difficulty in the estimation thereof did not convert the accrued liability into a conditional one. Profits or gains had to be understood in a commercial sense.

4.2.11. In the case of Rotork Controls India (P.) Ltd. v. CIT4 the assessee-company was engaged in selling certain products. At the time of sale, the company provided a standard warranty that in the event of certain part becoming defective within prescribed period, the company would rectify or replace the defective parts free of charge. This warranty was given under certain conditions stipulated in the warranty clause. The Assessing Officer disallowed the provision created for warranty on the ground that the liability was merely a contingent liability and hence not allowable as deduction u/s 37 of the Act.

When the matter finally came up before the Hon'ble Supreme Court, it entitled the assessee to deduction on the "accrual" concept by holding that a provision is recognized when : "(a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation : and (c) a reliable estimate can be made of the amount of the obligation". Resultantly, the provision was held to be deductible.

4.2.12. The Hon'ble Jurisdictional Hyderabad Tribunal in case of NMDC v. DCIT while deciding the deductibility of mine closure obligation has held the provisions for an accrued existing liability, even though, the actual expenditure may take place at a later date, is an allowable deduction.

4.2.13. Further, The Appellant place reliance on judicial precedents6 wherein following principles laid down by the judicial courts on allowability of site restoration expense;

the very moment assessee dug pits, liability did arise and it was entitled for deduction of expense which it was supposed to incur for filing those pits.

It is an admitted fact that when an assessee follows the mercantile system of accounting, he needs to make a provision in the account books towards all related expenditure whether or not paid during the same financial year. The only requirement is that the assessee needs to make a provision with a reasonable estimate.

Incurring of expenses:

4.2.14. The Appellant further submits that it has been incurring expenses towards restoration of sites during the subsequent years and the details of the same are provided vide additional evidence before your goodself.

Accordingly, the contention of the learned AO that the Appellant never incurred expenses towards the site restoration is not correct.

The enclosed Note for approval demonstrates the incurrence of expenses for site restoration.

Income Computation and Disclosure Standard (ICDS)

4.2.15. Though the provisions of ICDS are not applicable to the year under consideration, reference is drawn to the ICDS-X: Provisions, Contingent Liability and Contingent Assets wherein it is stated that provision shall be allowed as deduction subject to fulfilment of following condition.

- *A person has a present obligation as a result of past events,*
- *It is reasonably certain that an outflow of resources embodying economic benefits will be required to settle the obligation, and*
- *A reliable estimate can be made.*

4.2.16. As discussed in the foregoing paragraphs, the condition precedent for recognition of provision under the Companies Act and Accounting standard prescribed thereunder, ICDS as well as judicial precedents under the Act are satisfied/ complied in the present case and accordingly, the provision for Site Restoration expenses is allowable as deduction.

The Appellant wishes to submit that provision created in respect of site restoration cost meets all the recognition criteria as demonstrated below:

Particulars	**Condition as per AS .**	**Condition as per ICDS**
	Accordingly, the liability to restore the site arises when the Appellant takes land on lease and erects the towers.	
It is ***reasonably certain*** that an outflow of resource would be required to settle the obligation;	The Appellant would be required to incur expenses for restoring the sites. Further, estimation of expenses are made having regard to the average material and labour cost required for such work. Without prejudice to the above, the subsequent expenses incurred for restoration of sites clearly demonstrate incurring of expenses by the Appellant.	
It is ***probable*** that an outflow of resources embodying economic benefits will be required to settle the obligation		
A reliable estimate can be made of the amount of obligation	The Appellant has quantified the amount of provision taking into account the labour and material costs to be incurred for restoring the sites (dismantle/ remove the towers and other fixtures, remove concrete base, patch-up the land/building, etc.). Without prejudice to the above, the subsequent expenses incurred for restoration of sites clearly justifies the degree of estimation of such expenses by the Appellant.	

4.2.17. We wish to submit that the principles laid down by above judicial precedents squarely apply to the Appellant's case and therefore, the provision in relation to site restoration shall be allowed in the year of erection of towers on those sites.

It is a well settled principle that although the ultimate cost to be incurred in future it is necessary to estimate and to provide for the same for computing the business income in line with principal of matching concept.

Given the above, since all the condition prescribed under the accounting standards, ICDS as well as conditions laid down by judicial precedents being satisfied by the Appellant, we pray before your goodselves to kindly allow deduction towards provision for site restoration expenses and uphold the deletion made by the learned CIT(A) in this regard.

Applicability of Rule 46A

4.2.18. The Revenue has erred in stating that the learned CIT(A) has failed to remand the matter to the AO for verification. In this regard, the Appellant submits that as per Rule 46A of the Income-tax Rules 1962, the learned CIT(A) not

take into account any evidence produced under sub-rule (1) of Rule 46A unless the learned AO has been allowed a reasonable opportunity.

4.2.19. In this regard, we wish to refer to the provision of Rule 46A as captured below:

"46A. (1) The appellant shall not be entitled to produce before the [Deputy Commissioner .(Appeals)] [or, as the case may be, the Commissioner (Appeals)] , any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the fAssessing Officer] , except in the following circumstances, namely :—

(a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or

(c) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or

(d) where. the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.

(1) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b)to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant."

(2) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271]

4.2.20. In this regard, we wish to submit that the powers of the learned CIT(A) is very wide and co-terminus with the powers of the AO.

We wish to draw reference to provision of section 250(4) of the Act as well which states that — "The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals)"

4.2.21. In this regard, we wish to place reliance on the decision of the Hon'ble Jurisdictional ITAT in the case of DCIT Vs. NE Technologies India (P.) Ltd [2014147 taxmann.com 405 (Hyderabad - Trib.) as well, wherein the Hon'ble ITAT had held as under with respect to admission of additional evidence:

" ...The matters to be considered by the first appellate authority need not be confined to what was considered by the Assessing Officer while making the order appealed against...

In the instant case the entire additional evidence has come on the record of the first appellate authority because the first appellate authority decided to examine the facts of the case in depth and adjudicate upon the matter on the basis of evidence and material thus gathered The learned CIT(A) was empowered to do so under the provisions of Section 250(4).. There may be cases where additional evidence is admitted by the first appellate authority on a request or application being made by the assessee. In such cases Sub-rule (2) of rule 46A requires the first appellate authority to allow the assessing officer a further opportunity to rebut the fresh evidence filed by the assessee. Even that requirement cannot be said to be a rule of universal application. If the additional evidence furnished by the assessee before the appellate authority is in the nature of clinching evidence leaving no further room for any doubt or controversy, in such a case no useful purpose would be served on performing the ritual of forwarding the evidence/material to the Assessing Officer and obtain his report and, in such exceptional circumstances the requirement of sub-rule (3) of rule 46A may be dispensed with."

4.2.22. Given the above ruling of the Hon'ble Jurisdictional ITAT, we submit that where the additional evidence is clinching and provides clarity and does not require report of the AO, there would arise no necessity in forwarding the same to the AO.

4.2.23. Accordingly, the above decision would squarely apply to the facts of the present case as the Appellant had only furnished the lease agreements to the learned CIT(A) to draw his attention to the clause which specifies that the Appellant is under the obligation to restore the leased land to its original condition upon vacating the land.

4.2.24. Notwithstanding the above, the Appellant wishes to submit that the learned CIT(A), primarily allowed the ground in favor of the Appellant by referring to the legal arguments that the expenditure was allowable pursuant to the Accounting Standard and ICDS requirements to be complied with and by placing reliance on the decision of Bharat Earth Movers Ltd and M/s Calcutta Co. Ltd (supra).

The learned CIT(A) did not refer to any clause from the agreement furnished as additional evidence and allowed the ground in favor of the Appellant driven by the fact that the learned AO had made the disallowance merely by citing the provision for site restoration to be unascertained and had not brought anything on record to establish such claim.

*4.2.25. In this regard, reference may be drawn to the decision of the Hon'ble Cuttack ITAT in case of **B.D. Patnaik vs. DCIT (20011 116 taxman 184 (Cuttack) Wag.)** wherein it was held that deletion of the disallowance based on legal provision cannot be construed to be within the ambit of 'additional evidence' for the purpose of Rule 46A, even though the Assessee files the additional evidence.*

Further, reference is also drawn to Hon'ble Gauhati ITAT decision CIT Vs. Poddar Swadesh Udyog (P.) Ltd. [2008] 168 Taxman 182 (Gauhati) wherein it was held that the CIT(A) and Tribunal had committed no error in law in relying upon the documents filed subsequently at the appellate stage, which were in continuation of the books of account and other documents filed before the Assessing Officer.

4.2.26. We submit that the decision of the learned CIT(A) in favor of the Appellant is pursuant to the detailed legal submission filed and there was no requirement to remand the matter to the learned AO. Accordingly, we humbly request your goodself to dismiss the said ground raised by the Revenue."

20. We have heard the rival contentions and perused the material available on record. We find the AO in this case made the additions on the ground that assessee has not incurred any such expenditure till date and could not submit any bills and vouchers and assessee was conveniently creating a provision for future possible likely or unlikely liability and claiming the same as present year attributable expenditure. We find that ld.CIT(A) deleted the additions the reasons of which are reproduced in preceding paras. Further, the ld.CIT(A) had taken on record the additional evidence filed by the assessee during the appellate

proceedings without calling for the remand report or comments from the Assessing Officer.

21. In this regard, we may refer to section 250(4) of the Act and Rule 46A of Income Tax Rules, 1963. Section 250(4) of the Act provides as under :

> (*4) The* [81]*[***]* [82]*[Commissioner (Appeals)]* [84]*may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the* [83]*[Assessing] Officer to make further inquiry and report the result of the same to the* [81]*[***]* [82]*[Commissioner (Appeals)].*

Similarly, Rule 46A of Income Tax Rules provides as under:

46A. (1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :—

(*a*)	where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or
(*b*)	where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or
(*c*)	where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or
(*d*)	where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.

(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—

(*a*)	to examine the evidence or document or to cross-examine the witness produced by the appellant, or
(*b*)	to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (*a*) of sub-section (1) of section 251 or the imposition of penalty under section 271.]

22. The Rules were framed by the Board in accordance with the power conferred on it by section 295 of the Act and the Rules after being framed were laid before the Parliament. As the rules were duly framed by the Board and are statutory in nature, in our view, the power given to ld.CIT(A) are required to be exercised in accordance with the rules framed under the Act. From the bare perusal of Rules, it is abundantly clear that the ld.CIT(A) in case chooses to admit any additional evidence in that eventuality, he/she is under mandatory obligation to provide a reasonable opportunity to the Assessing Officer with a view to examine the evidence or document or permit to cross-examine the evidence produced by the assessee. Further, the law contemplates the Assessing Officer to produce any witness or document or evidence in rebuttal to the evidence produced by the assessee in the appellate proceedings.

23. In the present case, the ld.CIT(A) had decided the ground without calling for a remand report from the Assessing Officer. At this juncture, it was the submission of the learned AR that if given an opportunity, the assessee is in a position to substantiate with evidence to show that expenses were actually incurred in the year under consideration for site restoration.

24. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to grant one more opportunity to the assessee to substantiate its case by leading evidence to his satisfaction. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly.

25. In the result, the appeal filed by the Revenue is allowed for statistical purposes while the corresponding C.Os filed by the assessee are dismissed as withdrawn.

26. As the facts and issues are identical in all the appeals, following our decision given in lead appeal ITA 553/Hyd/2020, the remaining captioned appeals i.e., are also allowed for statistical purposes.

27. To sum up, all the appeals of Revenue are allowed for statistical purposes and the C.O.s filed by the assessee are dismissed as withdrawn.

Order pronounced in the Open Court on 30th November, 2022.

Sd/-	**Sd/-**
(R.K. PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 30th November, 2022.
Vinodan/Yamini sps

Copy to:

S.No	Addresses
1	ACIT, Central Circle 3(2) 7th Floor, Aayakar Bhavan, Hyderabad
2	M/s. Ascend Telcom Infrastructure (P) Ltd, Plot No.332, Mani Mansion, Defence Colony, Sainikpuri, Secunderabad 500094
3	CIT (A)- 11,Hyderabad
4	Pr. CIT-Central, Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order