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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 09.03.2017**

\+ ITA 436/2014

COMMISSIONER OF INCOME TAX ..... Appellants
Through: Mr. Raghvendra Singh and Ms. Lakshmi Gurung, Advocates.

Versus

LINK ENGINEER PVT. LTD. ..... Respondent
Through: Mr. Shubham Bhalla, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S.RAVINDRA BHAT, J.(OPEN COURT)

1. This appeal urges the following question of law:

> Whether the learned ITAT erred in restricting the addition of ₹1.00 crore to ₹50 lakhs on account of bogus claim of consultancy charges payments to M/S T&G Quality Management Consultants Limited, an entity controlled by one S.K. Gupta who admitted to providing accommodation entries.

2. The brief facts of the case are that on 12.12.2006 search and seizure action was conducted at the business of Shri. S.K. Gupta along with various concerns in which he and his family members were interested. Action under Section 132 of the IT Act, 1961 was conducted in the case of various companies owned or controlled by him and also in the case of different individuals connected with the said companies. From the computerized books of account seized during the search and the numerous bills seized from the

business premises of Sh. S.K. Gupta, it was found that various companies controlled by him had issued bills to Link Engineers Pvt. Limited of substantial amount (for software development and for providing professional services.) During the course of survey at both the office during the FY 2004-2005 and FY 2005-2006 premises, it was discovered that there was no documentary evidence other than bills to support the fact that the relevant services had been provided by the companies of Sh. S.K. Gupta.

3. The directors of the assessee were confronted with this statement and asked to produce any evidence in support of the claim for such expenses. They directors admitted that there was no agreement and that they did not know whether any software was installed. The assessee could not also produce any register to show that any employee of S.K. Gupta's company ever entered the premises of the assessee to install, update repair any software or provide any service. Thus, the revenue was of the opinion that the assessee had not taken any consultancy services from T&G Quality Management Consultants Limited, for its contract with M/s LMZ Energy (I) Limited. Further T&G Quality Management Consultants Limited had no infrastructure or manpower to provide the consultancy services in the state of Bihar as claimed by the assessee. Therefore the AO added ₹1,00,00,000/- (Rupees one crore) into the income of the assessee. Other amounts added and brought to tax were ₹5,25,000/- (towards annual maintenance charges having been paid to Hitech Computech Pvt. Ltd another company of S.K. Gupta was found to be false); business promotion expenses of ₹31,28,645/- (which was held to be towards personal items of expenditure of the promoter Shri Siddharth Sikka).

4. The assessee's appeal partly succeeded, in that the CIT (A) took note of the surrender made to the extent of ₹50 lakhs and deleted the balance. The CIT

(A) noted:

> *"It is seen from the records as well as the submission made by the appellant, that on the basis of survey conducted, the appellant voluntarily agreed for settlement with the Income tax department to buy peace. However, during the survey no unaccounted assets or any other incriminating documents were found. In fact the A.O. has elaborately commented upon absence of services rendered. The survey team on ~undisclosed amount at Rs.50,00,000 in AY 05-06 and Rs.50,00,000 in AY 06-07. There was no need to settle at this figure if the undisclosed income or excessive expenses were more than this figure. There is merit in the submission of the appellant that there was a settlement with the survey team."*

After noting the assessee's submissions that its directors retracted from the statement on 3.3.2010 and that S.K. Gupta had given another statement during appellate proceedings, the CIT (A) reasoned as follows:

> *"11. In this case since the retraction has occurred much after the assessment has taken place, sub clause 46A (1) (c) seems to be applicable here, i.e. the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; here clearly the retractions have come much after the assessment has taken place and there is no way the appellant could have produced these statements or affidavit before the A.O. These being important pieces of evidence for the grounds of appeal, were offered to the A.O. for examination and comments which have not been forthcoming and are therefore, allowed to be entertained. In any event, these evidences were sought by the Commissioner of Income-tax (Appea1s) dealing with this matter in AY 05-06 and therefore, are admissible otherwise also.*
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> *12. It is clear from the above records that the addition was based on the statement of Mr. S.K.Gupta who has retracted from the same. The AR has relied on various judgments on the subject to substantiate the fact*

that the addition cannot be made on the statement of Mr. S.K. Gupta which has later been retracted. There is merit in argument of the assessee. Following the decision of Hon'ble Delhi High Court in Cona Electric Co v CIT 152 ITR 507 It is held the statement of Sh. S K Gupta may be excluded from consideration, similarly the statement of M D Gupta also needs to be excluded from consideration."

5. The impugned order of the ITAT recorded as follows:

"After carefully considering the arguments and written submissions of both the sides in the light of case laws cited, we find that Ld. CIT(A) has passed a well reasoned and elaborate order for both the years considering each and every aspect of the matters in detail and the basis and reasoning as given by Ld. CIT(A) are found to be just and appropriate. In the absence of any contrary material having been placed on record, we do not find any reasonable basis to interfere in the order passed by Ld. CIT (A), which are upheld for both the years and both the appeals of the department are dismissed."

6. The revenue argued that the ITAT's logic is utterly indefensible and that the vague notions of the CIT (A), i.e., that the addition had to be restricted to the extent of ₹50 lakhs being "just and appropriate" was unsustainable under the circumstances. It was argued that once the assessee was unable to justify the expenditure claimed, whether Shri S.K. Gupta's statement was on record, or was made in connection with other proceedings, were entirely irrelevant. The deletion of ₹50 lakhs on the grounds of its being just or appropriate was under these circumstances untenable.

7. Mr. Bhalla, learned counsel for the assessee argued that the order of the ITAT was justified under the circumstances and that given the fact that it was an affirming and concurrent one, this court should desist from interfering with it. Counsel submitted that the statement made during the course of assessment proceedings should have been taken on the record and that the ITAT was

justified in upholding the CIT (A)'s findings. Learned counsel stressed that material found in the course of search or other proceedings in relation to a third party assessee could not be treated as conclusive in relation to the present case; although the assessee was unable to show the precise nature of the services provided (and for which expenses were justifiably claimed) that *per se* could not lead one to conclude that the expenses were *bogus.* Counsel thus, underlined the distinction between lack of a full or proper explanation on the one hand, and no explanation on the other.

8. This court is of the opinion that the impugned order is unreasoned and has blindly accepted the CIT (A)'s logic that *propriety* demands that the assessee's surrender –restricted to ₹50 lakhs should be accepted. The expenses claimed were ₹1 crore. Once the assessee admitted that ₹50 lakhs was claimed excessively, the onus of showing that the balance ₹50 lakhs was a justified expenditure lay upon it. The assessee did not discharge that onus; the AO was therefore justified in bringing in to tax that expenditure. The reasoning adopted by the CIT (A) and the ITAT are therefore, unsustainable.

9. For the foregoing reasons, the question of law framed has to be answered in favour of the revenue; the appeal is accordingly allowed, but in the circumstances without any order on costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

MARCH 09, 2017