

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' B '**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

I.T. A. No.612/Bang/2011
(Assessment Year : 2003-04)

Shri P. Shyamaraju,
Divyasree Chambers, Wing-A,
11, O Shaugnessy Road,
Bangalore-560 001
PAN AIOPP 2600D

õ . Appellant.

Vs.

Dy. Commissioner of Income Tax,
Central Circle 2(2), Bangalore.

õ .. Respondent.

Appellant By : Shri A. Shankar, Advocate.
Respondent By : Smt. A. Neera Malhotra, CIT(D.R)

Date of Hearing : 16.7.2015.
Date of Pronouncement : 30.7.2015.

O R D E R

Per Shri Jason P. Boaz, A.M. :

This appeal by the assessee is directed against the order of the Commissioner of Income Tax, Karnataka (Central), Bangalore dt.28.3.2013 passed under Section 263 of the Income Tax Act, 1961 (in short 'the Act') for Asst. Year 2003-04.

2. The facts of the case, briefly, are as under :-

2.1 A search and seizure action under Section 132 of the Act was conducted at the residence as well as business premises of the assessee on 1.3.2007. A notice under Section 153A of the Act was issued to the assessee on 14.11.2007, in response to which the assessee filed a return of income %under protest+ on 14.12.2008 declaring total income of Rs.1,00,000 and agricultural income of Rs.12,00,000. The assessment was concluded under

Section 143(3) rws 153A of the Act vide order dt.31.12.2008 accepting the income returned/admitted by the assessee, without making any addition thereto.

2.2 Subsequently, the CIT, Karnataka (Central), Bangalore, on examination of the records of assessment for the assessment year 2003-04, proposed to revise the said order of assessment dt.31.12.2008 by invoking the provisions of section 263 of the Act as he was of the view that the order was erroneous and prejudicial to the interest of revenue. In that view of the matter, the learned CIT issued a show cause notice dt.1.10.2010 to the assessee proposing to revise the order of assessment dt.31.12.2008 for Assessment Year 2003-04 under Section 263 of the Act. The relevant portion of the show cause notice reads as under :-

2. On a perusal of the assessment order for the assessment year 2003-04, it is observed that evidence relating to payments in cash over and above the payments made by cheque for the purpose of acquisition of land was seized and identified as seized material A/VSM/16 during the course of search under Section 132. The said seized material contained the survey numbers of the lands, dates of registration and total payments made in cash against each document registered.

3. The Assessing Officer on the basis of the seized material has made additions as unexplained investment in purchase of lands. However, instead of relying on the date of registration as per the seized material, for bringing the cash component to tax, the Assessing Officer has erroneously relied upon the submission of the assessee dt.17.11.2008. The submission is a statement of account of Sri Shyamaraju in the books of M/s. Shyamaraju and Co. India Pvt. Ltd., wherein the details of land as at the end of the Financial Years 2004-05, 2005-06 and 2006-07 are reflected.

4. On this account, the payments of the cash component have not been properly assessed in the year of registration as per the seized document. As the issue of charging the cash component of the payments to tax as unexplained investment has not been properly examined and addressed by the Assessing Officer for the assessment year 2003-04, the Assessing Officer's order is erroneous in so far as it is prejudicial to the interest of revenue.

5. It is therefore proposed to pass an order under Section 263 of the Act, as the circumstances of the case justify, cancelling the assessment and directing a fresh assessment."

2.3 The learned CIT, after affording the assessee opportunity of being heard and considering the written submissions filed by the assessee, passed an order under Section 263 of the Act dt.31.3.2011 in respect of Assessment Year 2003-04 directing the Assessing

Officer to make a fresh assessment of the assessee's income for the said period in the light of his directions in the impugned order. The observations of the learned CIT in the impugned order, at paras 8 & 9 thereof, are as under :-

“ The assessee's contentions have been examined and are discussed as follows :-

i) the table/format enclosed as Annexure C to the assessment order for the assessment year 2005-06 is nothing but an extract on the culled out sheets from the pen drive which were provided to the assessee at the time of the assessment proceedings which is submitted as exhibit in the assessee's submissions.

ii) The Commissioner of Income Tax (Appeals) in his order for the assessment year 2005-06 granted relief on the ground that the cash components in respect of the lands registered prior to assessment year 2005-06 were not chargeable to tax for the asst year 2005-06 as the cash components are given either at the time of registration or before the registration, but not after the registration date. The CIT (Appeals) thus only decided that the cash components were not chargeable to tax during the Assessment Year 2005-06 and nowhere has he held tht there were no payments in cash to the land owners. The fact that the department did not pursue the issue for the assessment year 2005-06 does not by itself imply that the department cannot bring to tax the amounts concerned for the respective assessment years. The issue has reached finality only as far as assessment year 2005-06 is concerned.

iii) The property documents were released on an application made by assessee for release of original documents to facilitate the transaction, for the reason that the concerned property was accounted for and not for the reason that the entire source for investment in the property was accounted for. The assessee is drawing an inference too far. The mere fact that the property documents in respect of the said lands were released on an application made by the assessee, however cannot be interpreted to accept that the Assessing Officer had satisfied that all such transactions were fully accounted for. That inference is subject to assessment proceedings.

iv) The Assessing Officer instead of relying on the dates of registration as per the seized documents relied on the replies filed by the assessee in so far as cash payments were concerned, cash components are either paid at the time of registration or earlier to the date of registration.

v) There is no addition made on this aspect in the A.Y. under consideration.

9. I am therefore of the considered opinion that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. I therefore direct the Assessing Officer to charge to tax the cash components of the payments made to the purchasers during the previous year relevant to the Assessment Year 2003-04 for the lands registered during the year.”

3. Aggrieved by the order under Section 263 of the Act passed by the CIT, Karnataka (Central), Bangalore dt.31.3.2011 for Assessment Year 2003-04, the assessee has preferred this appeal raising the following grounds :-

"1. The order passed by the learned CIT under Section 263 of the Act in so far as it is against the appellant is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned CIT failed to appreciate that there was no error much less prejudicial to the interest of the revenue in the order passed by the Id. Assessing Officer warranting revision under Section 263 of the Act and consequently, the order by the Id. CIT is opposed to law and facts of the appellant's case and requires to be cancelled.

3. The Id. CIT failed to appreciate that the various issues pointed out in the notice issued under Section 263 of the Act as constituting errors prejudicial to the interest of revenue were in fact examined in detail by the Id. A.O. in the assessment proceedings and therefore, the view of the Id. CIT that there was no application of mind amounts to a different opinion of the Id. CIT that there was no application of mind amounts to a different opinion of the Id. CIT for which the provisions of section 263 of the Act cannot be invoked. The impugned order being unsustainable in law deserves to be cancelled.

4. The Id. CIT is not justified in setting aside the assessment proceedings and directing the Assessing Officer to make a fresh assessment under the facts and in the circumstances of the appellant's case. He failed to appreciate that the direction to make a fresh assessment amounts to making fishing and roving enquiries without any material in support thereof and consequently, the impugned order passed being bad in law is liable to be cancelled.

5. The Id. CIT erred while issuing notice under Section 263 of the IT Act in as much as, no quantification was ever furnished to the appellant while initiating the proceedings under Section 263 of the Act thus, vitiating the very provision of revision so empowered with the Id. CIT and thus, the impugned order passed is bad in law and liable to be cancelled.

6. Without prejudice to the above, the learned CIT failed to appreciate that the issues involved in the revision under Section 263 of the Act was earlier assessed by the Id. A.O. and that the impugned additions so originally made were deleted by the learned CIT (Appeals) in appeal and further that the department had not pursued the same in second appeal and thereby outside the provisions of section 263 of the Act and the impugned order passed is bad in law and liable to be cancelled.

7. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered."

In support of its appeal, the learned Authorised Representative of the assessee has filed a paper book containing 82 pages.

4.1.1 The learned Authorised Representative of the assessee contended that the actions of the learned CIT in invoking the provisions of section 263 of the Act is without both jurisdiction and proper application of mind. It was contended that the twin conditions required to be fulfilled under Section 263 of the Act; i.e. that the order of assessment must be erroneous and also prejudicial to the interests of revenue having not been satisfied, the assumption of jurisdiction itself is not in accordance with law and therefore the impugned order requires to be set aside and cancelled. In support of the assessee's contentions, the learned Authorised Representative has placed reliance on the following pronouncements :-

- i. CIT V Max India Ltd. reported in 295 ITR 282 (SC).
- ii. Malabar Industrial Co. Ltd. V CIT reported in 243 ITR 83 (SC).
- iii. CIT V Gabriel India Ltd. reported in 203 ITR 108 (Bom)
- iv. CIT V Sunbeam Auto Ltd. reported in 332 ITR 167 (Delhi).
- v. CIT and Another V D.G. Gopala Gowda (ITA No.1422/2006 dt.5.3.2013) . unreported decision of the Hon'ble Karnataka High Court; and
- vi. Saravana Developers V CIT in ITA No.620/Bang/2011 & 48/Bang/2013 dt.6.9.2013 of the co-ordinate bench of the ITAT, Bangalore.

4.1.2 The learned Authorised Representative submitted that in the course of assessment proceedings, the assessee has furnished its reply in respect of the alleged cash components involved in the purchase of lands; the details of which are forthcoming in the excel sheet which was extracted from the pen drive seized as A/VSM/16 received from the residence of Sri V.Samba moorthy, G.M. (Finance) of the group entities. It is contended that the said details extracted from the seized pen drive cannot be relied upon and used against the assessee, as the figures mentioned therein are only estimates and not real figures. It is submitted that since the extracted figures from the pen drive are only estimates, they have no evidentiary value and therefore the conclusions reached by the learned CIT that they form a

basis for making additions is preposterous to say the least. The learned Authorised Representative further contends that there is nothing in the concerned seized material to even remotely indicate that the so called alleged cash payments for purchase of lands were made during the year under consideration, since no dates are mentioned in the seized records.

4.1.3 The learned Authorised Representative pointed out that the very issue of the alleged payments of the cash components for the land dealings with regard to the T.A. Usman Land which is termed as LOT-1/108, which is the subject matter of revision under Section 263 of the Act, was also the subject matter of examination in the assessment proceedings for Assessment Year 2003-04. It is submitted that the Assessing Officer, in the course of assessment proceedings relying upon the details in the extracted excel sheet from the seized pen drive has raised a specific query on this issue in his notice/letter dt.8.12.2008. In response thereto, the assessee vide reply dt.15.12.2008 has furnished a detailed explanation in this regard (relevant correspondence; i.e. the Assessing Officer's letter dt.8.12.2008 is placed at pages 31 to 39 of the assessee's paper book and the assessee's reply vide letter dt.15.12.2008 is at pages 40 to 47 of the paper book). The learned Authorised Representative submitted that the Assessing Officer duly applying his mind after verification of the alleged entire issue of the cash payments was satisfied with the submissions of the assessee on this very issue and has therefore not made any additions in respect of the alleged payment of cash payment for purchase of T.A. Usman Land at Lot-1/108. It was further contended that as can be seen, from the details of the Assessing Officer queries, vide letter dt.8.12.2008 and the assessee's reply thereto, vide letter dt.15.12.2008, that there was no lack of inquiry or inadequate enquiry on the part of the Assessing Officer on this issue to warrant revisionary proceedings under Section 263 of the Act by the Id CIT. It was prayed

that in view of the factual matrix of the case as laid out above, the impugned order passed under Section 263 of the Act for Assessment Year 2003-04 requires to be quashed.

4.2 Per contra, the learned Departmental Representative vehemently supported the impugned order of the learned CIT, submitting that the action of the learned CIT in passing the order under Section 263 of the Act was justified as the said cash payments made towards purchase of lands which were clearly evident from the seized material were not brought to tax by the Assessing Officer in the assessee's hands in the order of assessment for Assessment Year 2003-04. The learned Departmental Representative further submitted that the arguments put forth by the learned Authorised Representative, that the figures appearing in extracted excel sheet from the seized pen drives were mere estimates, is not correct. The said cash amounts appearing in the extracts from the seized pen drive is nothing but undisclosed income of the assessee being invested in the purchase of the said lands. The learned Departmental Representative added that in accordance with the principle of preponderance of probability, the addition can be made in the year of registration, which is the period relevant to Assessment Year 2003-04. The learned Departmental Representative contends that the directions of the learned CIT to the Assessing Officer to make the addition is completely justified, as the payment of the cash component by the assessee would be either at the time of or just before the time of registration of the property. The learned Departmental Representative submits that in the factual matrix of the case, the order of assessment for Assessment Year 2003-04 passed under Section 143(3) rws 153A of the Act dt.31.12.2008 is both erroneous and prejudicial to the interests of revenue and clearly warrants invocation of the provisions of section 263 of the Act and therefore the impugned order of the Id. CIT be confirmed and upheld.

4.3 In his rejoinder the learned Authorised Representative submitted that the details in excel sheet which was extracted from the seized pen drive, on which the learned Departmental Representative places strong reliance, were only estimations, as if one were to observe therefrom, the rates are the same for all the different lands which were purchased by the assessee. The learned Authorised Representative submitted that the rates for purchase of lands situated at different places cannot be the same and consequently, the said rates mentioned in the said excel sheets wherein the same rates are taken for lands at different places are only estimates and not reliable. The learned Authorised Representative further submitted that the reasoning given by the CIT in the impugned order under Section 263 of the Act, that the payments of cash component could have been before registration or on the date of registration, demonstrates that the said surmise made the Id. CIT is only based on suspicion and is bereft of any material evidence to support this view. The learned Authorised Representative argued that the principle of preponderances, put forth by the learned Departmental Representative, is alien to proceedings under Section 263 of the Act and indicates that there are two views possible on this issue and since the Assessing Officer took one possible view, the Id. CIT had no justification to assume jurisdiction under Section 263 of the Act. It is submitted that only those orders which are erroneous and prejudicial to the interest of revenue can alone be subjected to revision under Section 263 of the Act. The learned Authorised Representative further submitted that the inquiries conducted by the Assessing Officer in the proceedings need not be discussed in the order of assessment and it is sufficient if the Assessing Officer has enquired into the matter and sought for and obtained the assessee's reply/explanation on the issues raised. In this context, the learned Authorised Representative placed reliance on the decision of the Hon'ble High Court of Delhi in the case of Sunbeam Auto Ltd. (supra). It was finally pleaded that in view of the above, the impugned

order of the CIT passed under Section 263 of the Act vide order dt.31.3.2011 for Assessment Year 2003-04 requires to be quashed.

4.4.1 We have heard the rival contentions and perused and carefully considered the material on record. From the submissions made and paper book at pages 31 to 39 thereof filed by the learned Authorised Representative of the assessee, we find that the Assessing Officer in the course of assessment proceedings had in the questionnaire letter dt.8.12.2008, inter alia, has specifically sought the explanation of the assessee in respect of the payment of the cash components towards the purchase of T.A. Usman Lands at LOT 1/108 arising at of the excel sheet extracted from the seized pen drive marked A/VSM/16. In this regard, it is seen from the same paper book at pages 40 to 47 that the assessee has submitted his reply to the queries raised by the Assessing Officer in letter dt.8.12.2008. Thus, it is clear that the Assessing Officer had called for details and explanation in respect of the details in the seized pen drive; the assessee submitted its explanation thereto, and it appears that the Assessing Officer was satisfied with the assessee's explanation as he took no further action in the matter. In this factual matrix of the case, we are of the opinion that the learned CIT was not justified in exercising revisionary jurisdiction under Section 263 of the Act as it is evident that the issue in question had already been acquired into and considered by the Assessing Officer in the course of assessment proceedings. Consequently, the twin conditions as envisaged in the provisions of section 263 of the Act, i.e. that the order of assessment for Assessment Year 2003-04 was erroneous and prejudicial to the interests of revenue, having not been satisfied in the case on hand, we are of the view that the learned CIT was not justified in the assumption exercise of jurisdiction under Section 263 of the Act and consequently the impugned order is liable to be quashed. In coming to this view, we drew support from the decision of the Hon'ble High Court of Bombay in the case of Gabriel India Ltd. (supra).

5. In the result, the assessee's appeal for Assessment Year 2003-04 is allowed.

Order pronounced in the open court on 30th July, 2015.

Sd/-
(P. MADHAVI DEVI)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore