

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2648/Del/2016
Assessment year : 2006-07

Prosperous Buildcon Pvt. Ltd., 17-B, MGF House, Asaf Ali Road, New Delhi. (PAN: AADCP4389H) (Appellant)	vs	Pr. CIT, Delhi-7, New Delhi. (Respondent)
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Appellant by : S/Shri Ajay Vohra, Sr. Adv., Gaurav Jain, Adv.
Respondent by : Smt. Pramita Tripathy, CIT DR

OR D E R

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

This appeal has been preferred by the assessee against order dated 01/03/2016 passed under section 263 of the Income Tax Act, 1961 (hereinafter called "the Act") passed by the Ld. Principal Commissioner of Income Tax – 7, New Delhi for assessment year 2006 – 07.

2. The brief facts of the case are that the return of income was originally filed on 30/11/2006 declaring income at nil. The return was processed under section 143 (1) of the Act on 06/09/2007. Subsequently, the AO, after recording the reasons and taking the necessary approval, issued notice under section 148

of the Act on 26/03/2013. The reassessment proceedings were initiated on the basis of information received from the investigation wing about huge cash drawings and deposits in the bank accounts of the assessee. This information was received consequent to search conducted upon EMAAR MGF group of companies. The reassessment proceedings were completed under section 147 read with section 143 (3) of the Act on 18th of March 2014 wherein no additions/disallowances were made and the reassessment was completed at 'nil' income.

2.1 Subsequently, the Ld. Pr. Commissioner of Income Tax issued show cause notice under section 263 of the Income Tax Act on 06/01/2016 on the ground that during the course of reassessment proceedings, the assessee company had admitted to the fact that huge cash drawings to the tune of Rs. 35.70 crores was made for the purpose of purchase of land by the assessee company. The Ld. Pr. CIT further noted that no adverse view was taken by the AO in the reassessment proceedings vis-a-vis section 40A(3) of the Act. The Ld. Pr. CIT recorded that the fact that cash payments were made was uncontroverted but no disallowance was made by the AO under section 40A(3) of the Act and, therefore, the order of the AO was erroneous in so far as it was prejudicial to the interest of the revenue. The relevant portion of the show cause notice reads as under –

“From the reasons recorded for reopening of assessment and also from the details on record, it is noticed that an amount of Rs. 35.70 crores was withdrawn by the assessee

in cash from its bank account. During the course of the assessment proceedings, it was explained that the cash withdrawal was utilised for purchase of land, which was shown in the closing stock of the company. Thus, it is seen that the assessee itself has treated the land as part of inventory and debited the same in the profit and loss account. The cash utilised for the purpose of purchase of inventory is directly hit by the provisions of section 40A (3) of the Income Tax Act. Non-application of the provisions of section 40A(3) of the Income Tax Act renders the assessment order erroneous in as much as it makes the same prejudicial to the interest of the revenue and therefore the same seems amendable to revision in terms of the provisions of section 263 of the Income Tax Act.”

2.2 In response to the show cause notice, the assessee submitted that the provisions of section 40A (3) were not applicable in the instant case as no expenditure had been claimed by the assessee. The assessee also submitted that where two views are possible and the AO had taken one possible view with which the Ld. Pr. CIT does not agree, the same cannot be treated as an erroneous order prejudicial to the interests of revenue.

2.3 However the Ld. Pr. Commissioner of Income Tax was of the view that it was wrong on the part of the assessee to contend that “purchase” was not expenditure and no expenditure had been claimed by the assessee. The Ld. Pr. CIT further noted that purchase was definitely expenditure as sales was an item of income. The Ld. Pr. CIT also noted that the expenditure on account of purchase of land gets set off against income arising from sale of land and because there was no sale in the relevant year, the entire value of purchase at the end of the year was reflected as closing stock of inventory. The Ld. Pr. CIT further noted that if this contention of the assessee was accepted, all the real estate companies would purchase land in cash and escape from the rigours of

section 40A(3) of the act. Thereafter, the Ld. Pr. CIT held that the reassessment order passed by the AO under section 147/143(3) was erroneous insofar as it was prejudicial to the interests of the revenue and the Ld. Pr. CIT directed the AO to pass an appropriate order after making the fresh assessment wherein an addition of Rs. 35.70 crores was made.

2.4 Aggrieved, the assessee has now approached the ITAT and has raised the following grounds of appeal –

“1. The Ld. Principal Commissioner of Income Tax, Delhi - 7, New Delhi (hereinafter referred to as 'Learned CIT') has erred on the fact and circumstances of case and law by setting aside the reassessment proceedings completed u/s 147 of the Act.

Appellant contends that the initiation of proceedings u/s 263 of the Act (dated 01.03.2016) is illegal, bad in law and void ab initio and is in gross violation of the principles of natural justice.

Ground No. 2:

The Learned CIT has failed to appreciate that neither the reassessment order could be regarded as erroneous in law nor could be said to be prejudicial to the interest of revenue.

Since the order of the Learned CIT is bad in law, the appellant contends that your Honor may grant a stay against the order u/s 263 and the consequential proceedings till the disposal of present appeal.”

Ground No. 3:

The Learned CIT has failed to appreciate that before making the impugned order u/s 263 of the Act, valid and proper opportunity was not provided to the appellant and as such, no valid order could have been made. The opportunity provided was highly illusory and could not be regarded as valid and proper.

Ground No. 4:

The Learned CIT has completely brushed aside the reply furnished by the appellant and has cancelled the order u/s 147 of the Act, which is not sustainable in law.

Ground No. 5:

The Learned CIT erred on the fact and circumstances of case and law in reconsidering the matter which has been already discussed and scrutinized at stretch by the assessing officer in the course of reassessment order u/s 147 of the Act.

Ground No. 6:

The Learned CIT has not considered the relevant condition for initiation of proceedings u/s 263 of the Act.

The appellant contends that since the assessing officer has completely verified the facts in the reassessment order u/s 147 of the Act. The said order cannot be held as erroneous and the same cannot be considered u/s 263 of the Act.

Ground No. 7:

The Learned CIT has erred on facts and circumstances of the case and in law by directing the assessing officer to pass an appropriate order wherein an addition of Rs. 35.70 crores on account of disallowance u/s 40A(3) of the Act is directed.

Ground No. 8:

The Learned CIT has grossly erred in the interpretation of Section 40A(3) of the Act wherein disallowance is proposed for any cash expenditure of above Rs. 20,000.

Appellant contends that the provisions of Section 40A(3) can be imposed only if an assessee has claimed deduction for an expenditure. Since the appellant has not claimed any deduction for land purchased during the year, the question of disallowance shall not arise.”

3. The Ld. Sr. Advocate submitted that the only issue involved in this appeal was whether the Ld. Pr. CIT was justified in making an order under

section 263 of the Act and directing the AO to disallow the alleged expenditure of Rs. 35.70 crores under section 40A(3) of the Act and to determine the income accordingly. It was submitted that the impugned action was contrary to the facts of the case as the amount of Rs. 35.70 crores represented payments made for purchase of land but no deduction for such expenditure was claimed during the year. The Ld. Senior Advocate further submitted that the Ld. Pr. CIT had disregarded the fact that the disallowance under section 40A (3) of the Act could be made only if such expenses were claimed as a deduction in the year under consideration. The Ld. Sr. Advocate further submitted that the AO had completely verified the facts in the reassessment proceedings and, therefore, the said order cannot be held as erroneous. The Ld. Sr. Advocate reiterated the fact that the provisions of section 40A(3) could be invoked only if the assessee had claimed deduction in respect of an expenditure and since the assessee had not claimed any deduction for the land purchased during the year, the question of disallowance could not arise.

3.1 The Ld. Sr. Advocate placed reliance on the judgment of the Hon'ble Delhi High Court in the case of *Ranbaxy Laboratories Ltd versus CIT* reported in 336 ITR 136 (Delhi) for the proposition that Explanation 3 to section 147 was not applicable where no disallowance had been made in the reassessment order on the issue raised in the reasons recorded. The Ld. Sr. Advocate also placed reliance on the judgment of the Hon'ble Delhi High Court in the case of CIT

versus Software Consultants reported in 341 ITR 240 (Delhi) for the proposition that jurisdiction under section 263 cannot be exercised *qua* issues which were beyond the scope of jurisdiction of the AO while passing the orders sought to be revised. It was prayed that the order passed under section 263 be quashed.

4. In response, the Ld. CIT DR read out extensively from the order passed under section 263 of the Act and submitted that the revision by the Ld. Pr. CIT was justified in law. She submitted that although the assessee had not claimed purchases as expenditure in the year under consideration, the same would have been claimed as expense in the succeeding years and as such there was a clear violation of the provisions of section 40A(3) of the Act by the assessee. The Ld. CIT DR also placed reliance on an order of the ITAT Jodhpur bench in the case of *Vaishali Builders and Colonisers versus ACIT* reported in 138 ITD 227 wherein the ITAT Jodhpur Bench had held that since the assessee was dealing in real estate and the land purchased was stock in trade, the payment made for purchase of land was expenditure in the business of the assessee and attracted the provisions of section 40A (3) of the Act. The Ld. CIT DR prayed that the order passed under section 263 of the act be upheld.

5. We have heard the rival submissions and have also perused the material on record. The facts of the case are undisputed. It is undisputed that the assessee had not claimed any expenditure towards purchase of land during the year under consideration. It also undisputed that the assessee's case was

reopened under section 147 of the Act only on the ground that assessee had made huge cash withdrawals and huge cash deposits in its bank accounts during the year under consideration. The reasons recorded for reopening dated 22/03/2013 mentioned that the assessment proceedings were initiated because the assessee had made huge cash withdrawal amounting to Rs. 35.70 crores and cash deposits amounting to Rs. 16.80 crores and that the sources of cash deposits need to be verified. The reasons further mention that the AO had reason to believe that an amount of Rs. 16.80 crores had escaped from the assessment for the year under consideration which was chargeable to tax. However, the fact remains that no addition was made on this issue and the reassessment was completed at "nil" income. It is also undisputed that violation of provisions of section 40A (3) was not the subject matter of the re-assessment proceedings. However, the Pr. Ld. Commissioner of Income Tax set aside the order passed under section 147/143 (3) of the Act and directed the AO to make an addition on account of violation of the provisions of section 40 A (3) of the Act although the same was not the subject matter of reopening and reassessment.

5.1 There are numerous judgments wherein the Hon'ble courts have held that if no additions were made in respect of reasons recorded, it was not open to the AO to make addition on some other ground. The Hon'ble Bombay High Court in the case of CIT *versus* Jet Airways India Ltd reported in 331 ITR 236

(Bombay) has observed that if an assessment has been reopened by recording reasons and ultimately in the reassessment proceedings if it was found that no income has escaped assessment in respect of such reasons recorded, then the AO cannot take up any other issue for examination. The Hon'ble Bombay High Court considered the explanation as appended to section 147 of the Finance Act, 2009 and observed that if the addition was made on the income for which the AO had recorded the reasons about its escapement, only then other issues can be looked into. The Hon'ble High Court further emphasised that once, after the issuance of a notice under section 148, the AO accepted the contention of the assessee and held that the income, which he had initially recorded reason to believe about its escapement, but on assessment he found it as a matter of fact, that no such income has escaped, then it is not open to him to independently assess some other income and if he intends to do so, a fresh notice under section 148 would be necessary.

5.2 This judgment of the Hon'ble Bombay High Court has been followed by the Hon'ble Delhi High Court in the case of *Ranbaxy Laboratories Ltd versus CIT* reported in 336 ITR 136 (Delhi). It flows from this that if the AO was not in a position to examine that issue, then in our opinion, the Ld. Pr. CIT would also not been a position to take cognizance of the issue under section 263 of the Act. In other words, even if, it is upheld that the reassessment under section 147 of the act was erroneous and prejudicial to the interest of the revenue, then also

on revival of such issue, the AO has to first see whether any addition could be possible on the escapement of income for which he has recorded the reasons. If it is established on record that there is no escapement of income for which the reasons were recorded, then in view of the two judgments, as aforesaid, no other issue could be examined by the AO. Similar view was held by the Hon'ble Delhi High Court in CIT (Exemptions) *versus* Monarch Educational Society reported in 387 ITR 416 (Delhi), Oriental Bank of Commerce *versus* Additional CIT reported in 272 CTR 56 (Delhi) and CIT *versus* Cheil Communications India Private Limited reported in 354 ITR 549 (Delhi).

5.3 Thus, we are of the considered opinion the Ld. Pr. CIT could not have sought to revise an order passed under section 147 read with 143 (3) of the Act on an issue which was not a subject matter of the reassessment proceedings under section 147 in the first place and the of assumption of jurisdiction under section 263 of the Act loses its validity on this count itself.

5.4 Further, the fact of the matter remains that the assessee had not claimed any expenditure towards purchase of land during the year under consideration and, therefore, the provisions of section 40A (3) of the Act could not have been legally invoked as they come into play only when an amount, which has been claimed as an expenditure, has been paid in cash. It is our considered opinion that the Ld. Pr. Commissioner of Income Tax was also not justified in setting aside the re-assessment order and directing the framing of an assessment by

applying provisions of section 40A (3) of the Act in a situation when the provision could not be invoked and the same would be contrary to the provisions of law, if so invoked. It is our considered opinion that the Ld. Pr. CIT does not have the power to direct the AO to do something which the Act itself does not permit. The invocation of jurisdiction under section 263 of the Act loses its validity on this count also.

5.5 Accordingly, we hold that the Ld. Pr. Commissioner of Income Tax had no jurisdiction or power to invoke provisions of section 263 of the Act on the facts and circumstances of the case and we deem it fit to quash the order passed under section 263 of the Act.

6. In the final result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 1.11.2017.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

DT. 1.11.2017
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT 5. DR

By Order

Asstt. Registrar