

**THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH "B", HYDERABAD**

**BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER  
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.1128/Hyd/2016  
Assessment Year: 2005-06**

GAR Corporation Private Limited, (Since GSR Hotels & Estates Private Limited merged w.e.f. 01.04.2012), Hyderabad. PAN- AACCG5792Q	vs.	Dy. CIT, Circle-2(2), Hyderabad.
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(Appellant)

(Respondent)

Assessee by :	Shri V. Raghavendra Rao
Revenue by :	Shri B. Kurmi Naidu

Date of hearing :	28-12-2017
Date of pronouncement :	24-01-2018

**ORDER**

**PER P. MADHAVI DEVI, J.M.:**

This is assessee's appeal for the A.Y 2005-06, filed against the order of the CIT(A)-9, Hyderabad dated 30-03-2016, upholding the assessment order passed by the A.O u/s 143(3) r.w.s 147 of the IT Act.

2. Brief facts of the case are that, the assessee company engaged in the business of construction and real-estate, filed its return of income for the A.Y 2005-06 on 01-11-2005 declaring taxable income of Rs. 34,73,250/-. The assessment was completed u/s 143 (3) of the IT Act on 26-10-2007, by accepting the returned income. Subsequently

the case was reopened by issuing a notice u/s 148 of the IT Act dated 25-02-2011. In response thereto, the assessee company filed a letter dated 14-03-2011, stating that the return of income filed on 01-11-2005 for the A.Y 2005-06, be treated as the return filed in response to the notice u/s 148 of the IT Act. The assessee also sought the reasons recorded for the reopening of the assessment.

3. Vide letter dated 29-03-2011, the reasons for reopening were communicated to the assessee and subsequently, the notices u/s 143(2) and 142(1) were issued seeking information from the assessee. On 14-11-2011, the assessee filed a letter objecting to the consideration of the cost of construction at Rs. 911/- as against Rs. 1,131/- per Sq feet claimed by the assessee company. Further vide letter dated 28-11-2011, the assessee objected to the reopening of assessment u/s 147 of the IT Act.

4. The A.O observed that for the A.Y 2005-06 the original assessment was completed u/s 143(3) but the issue was spread over two years. He observed that for the A.Y 2004-05 in which the issue had arisen, the case was also reopened u/s 147 of the Act and the same was not objected

to by the assessee company and the assessment was completed accordingly, and that the assessee is objecting to the reassessment only in this year on the ground that the original assessment was completed u/s 143(3) of the IT Act and as such the case cannot be reopened on the issues involved which are covered in the original assessment. Observing that the issue is rolling over to more than two years and in order to maintain uniformity of stand in each year, the A.O upheld the reopening of the assessment. Thereafter, he proceeded to consider the cost of construction and computed the cost of construction @ Rs. 912/- per Sq ft., and completed the assessment accordingly.

5. Aggrieved, the assessee preferred an appeal before the CIT(A), challenging both the reopening of assessment and also the addition made on account of excessive cost of construction claimed by the assessee. Ld. CIT(A) upheld the order of the A.O. Aggrieved, the assessee is in appeal before us by raising the following grounds of appeal:

*“1. The order of the CIT(A)-9, Hyderabad dated 30.03.2016 is erroneous, contrary to law and facts of the case.*

2.
  - a) *The CIT(A) is not justified in denying the contention of the Appellant that there was no new material in possession of the A.O to believe that the income had escaped assessment.*
  - b) *The CIT ought to have seen that the reassessment u/s 143(3) r.w.s 147 made by the A.O is beyond the time limit i.e. 31.03.2010 prescribed in the provisions of Income Tax Act and therefore not valid and void abinitio since such notice was served on the appellant on 25.02.2011.*
  - c) *The CIT(A) ought to have seen that all the information regarding expenditure of Rs. 4,32,20,009/- and its allocation over the occupiable/saleable area was very much there before the A.O while completing the original assessment and no new information has come into the possession of the A.O to the effect that the Appellant's income had escaped assessment and therefore the reassessment made u/s 143(3) r.w.s 147 is not at all correct and proper.*
3.
  - a) *The CIT (A) is not justified in sustaining the disallowance of Rs. 84,89,225/- out of cost of construction made by the A.O stating that the Appellant's contention of restricting the allocation of cost of construction to saleable area cannot be accepted.*
  - b) *The CIT(A) ought to have seen that though the gross built-up area is 90,000/- sq.ft, saleable/occupable area was on 72,523 sq.ft and the balance area represents common areas which cannot be sold and parking area which was given to the buyers of the constructed area free of cost along with the office area sold to them. Hence the cost of construction is to be divided by 72,523 sq.ft but not 90,000 sq.ft.*
4. *For all of the above and such other grounds as may be urged at the time of hearing it is most respectfully prayed that the Hon'ble Tribunal be pleased to direct the A.O to delete the disallowance of Rs. 84,89,225/- made in the assessment order in the interest of justice.*

Further, the assessee has also filed the following additional grounds of appeal:

1. a) *Ld. CIT(A) has erred in holding that there was failure to disclose fully and truly all material facts necessary for the assessment on the basis of remand report of the A.O*
  - b) *It was not stated in the reasons recorded u/s 148(2) of the IT Act that there was, on part of the assessee, any failure to disclose fully and truly all material facts necessary for the assessment. Such a stand is taken for the first time in the remand report furnished on assessee's submission.*
  - c) *The A.O has no where referred in the assessment order to any facts that were not already disclosed at the time of original assessment.*  
*The reasons recorded u/s 148(2) of the IT Act, the reasons stated in the assessment order and reasons submitted through the remand report for reopening are varied and inconsistent.*
2. a) *Alternatively, the expenditure of the Rs. 84,89,225/- incurred on construction of cellar and basement for purpose of electrical an DG rooms, maintenance office, driveway and parking areas of two wheelers and cars in the area of 17,477 Sq.ft is for the purpose of business and, therefore allowable us 37(1) of IT Act 1961.*
  - b) *The apartments sold could not have come into existence without the cellar, basement and common areas which are an absolute common necessity for the apartments and which are therefore unsalable. Expenditure of Rs. 84,89,225/- incurred on such common facilities is for purposes of business.*

6. The assessee filed an application for admission of the same stating that the above grounds are purely legal grounds and need no verification of facts and hence should be admitted. Having gone through the above original as

well as additional grounds of appeal, we find that the ground of appeal No. 2 is against the validity of reassessment proceedings u/s 147 of the IT Act and the additional ground No. 1 is only in support of original ground No. 2 and additional ground No. 2 is in support of original ground of appeal No. 3. Since all the facts are on record, we admit the additional grounds and proceed to adjudicate the same as under:

7. In support of ground No. 2, i.e against the validity of the notice u/s 148 of the IT Act, the Ld. Counsel for the assessee submitted that the notice for reopening of the assessment is issued after expiry of four years from the end of the relevant assessment year and therefore such reopening is not valid unless and until there is failure in the part of the assessee to disclose fully and truly all material facts necessary for assessment of its income. He drew our attention to various details filed by the assessee before the A.O during the assessment proceedings u/s 143(3) of the IT Act, to demonstrate that all the relevant material was filed by the assessee during such assessment proceedings and there was no failure on the part of the assessee to disclose fully and truly all material facts. He

also drew our attention to the contents of the reasons recorded for reopening of assessment, wherein there is no mention, whatsoever that the reopening is done due to the failure of the assessee to disclose fully and truly all material facts necessary for assessment of its income. Thus, according to him, the reassessment proceedings have to be held to be void ab-initio. In support of this contention, he relied upon following case laws:

(1) Shri Y.V. Anjaneyulu Vs. ITO (1990) 182 ITR 242. (AP).

(2) Sri S. Sree Ramachandra Murthy And another Vs. DY CIT and another (2000) 243 ITR 427 (AP).

8. The Ld. DR, on the other hand, supported the orders of the authorities below.

9. Having regard to the rival contentions and the material on record, we find that the assessment year before us is 2005-06 which ended on 31-03-2006. The assessment proceedings u/s 143(3) of the IT Act were completed on 26-10-2007 and four years from the end of the relevant assessment year ended on 31-03-2010. The notice u/s 148 of the IT act was issued on 25-02-2011. Therefore, it is clear that the notice u/s 148 of the IT Act was issued after the expiry of four year from the end of the

relevant assessment year. For the sake of clarity and ready reference, the provisions of Sec. 147 of the IT Act are reproduced hereunder:

*“147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

*Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”*

10. From a literal reading of the above provision, it is clear that where an assessment has been made under Sec. 143 (3) of the IT Act for the relevant assessment year, notice u/s 148 of the IT Act cannot be issued after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has

escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return u/s 139 of the IT Act or in response to the notice issued under sub Sec. 1 of 142 or Sec. 148 of the IT Act or to disclose fully and truly all material facts necessary for his assessment, for the relevant assessment year.

11. From the facts of the case on hand, it is clear that the assessee's case falls under the last limb of the proviso. The assessment was admittedly completed u/s 143(3) and there is no failure on the part of the assessee to make a return u/s 139 of the IT Act or in response to the notice issued under sub Sec. 1 of Sec 142 or Sec. 148 of the IT Act.

12. In such circumstances, it is to be seen if the A.O has recorded that there is any failure on the part of the assessee to disclose fully and truly all material facts. The reasons for reopening of assessment have been communicated to the assessee vide letter dated 29-03-2011 which is placed at page 10 of the paper book. The following is the reason recorded:

*“During the year of account, the assessee company which is engaged in construction activity has constructed a*

*property known as Queens Plaza at Begumpet, Hyderabad on the land belonging to six co-owners under a Development Agreement on 50:50 basis. As per the Development Agreement, the assessee has received 90,000/- Sft. The total cost of the construction was Rs. 8,20,52,329/- arrived at the rate of Rs. 911.69 per Sft. Instead of debiting cost of construction per Sft. At the rate for the years ending 31/03/2004 and 31/03/2005, However the assessee has adopted a rate of Rs. 1131.40 per Sft (Rs. 8,20,52,329/- divided by 72,523 Sft), which was incorrect as the assessee should have debited at Rs. 911.70 per Sft. Only for the area sold of 38,082 Sft. as on 31/03/2005. Hence the cost of built up area of 38,082/- Sft. Sold in the year 2005-06 works out to Rs. 3,47,19,459/- (Rs. 911.70 x 38,082 sft) instead of Rs. 4,32,20,009/- (Rs. 1131.40 x 38,082 sft) debited to the profit and loss account which resulted in excess claim of expenditure to a tune of Rs. 85,00,650/- (Rs. 4,32,20,009 minus Rs. 3,47,19,359) which has to be brought to tax”*

13. From the reading of the above reasons, it is clear that the A.O has not recorded that there is a failure on the part of the assessee to disclose fully and truly all material facts. In fact, it is also clear that the A.O has gathered the information only from the material filed during the assessment proceedings u/s 143(3) of the Act. Therefore, it is not a case of fresh information coming to the knowledge of the A.O subsequent to the assessment u/s 143(3) of the IT Act for coming to the conclusion that there is escapement of income. It is on the basis of the same material available during the assessment proceedings u/s 143(3) of the IT Act, that the notice u/s 148 of the IT Act

dated 25-02-2011 has been issued. We have perused the paper book filed by the assessee. We find that the A.O issued notices u/s 142(1) and 143 (2) of the Act on 26-12-2006 and had called for the valuation report for the property at “Queens Plaza” (which is the building constructed under the JDA) and also the details of sale of constructed area along with a note on the method of sale (floor wise & SFT wise) and how the expenditure is bifurcated. In reply thereto, vide letter dated 09-01-2007, the assessee filed the reply giving the details of the development agreement and also the details of sale of constructed area, but does not seem to have filed the copy of development agreement. If the A.O required some more information, he could have called for the same, but has failed to do so. On the basis of the very same material, he has issued a notice u/s 148 of the IT Act, which, in our opinion, is on ‘change of opinion’ but not due to failure of the assessee to disclose fully and truly all material facts. In such circumstances, the notice u/s 148 of the IT Act is beyond the period of limitation and hence not valid. The Hon’ble jurisdictional High Court in the cases (cited supra) relied upon by the Ld. counsel for the assessee has clearly

held that for reopening of an assessment which is completed u/s 143(3) of the Act, the A.O has to record a finding that there is failure on the part of the assessee to disclose fully and truly all material facts. Further, we find that the same issue had come up before 'B' Bench of this Tribunal in the assessee's own case for the A.Y 2004-05 and reopening of the assessment has been quashed. However, in the said year, the assessment was completed u/s 143 (1) of the IT Act whereas for the A.Y 2005-06, the assessment was completed u/s 143(3) of the IT Act. The CIT(A) has relied upon the remand report of the A.O to come to the conclusion that there was failure on the part of the assessee to disclose fully and truly all material facts. We find that the requirement of law is that the A.O has to be satisfied about the failure of the assessee, before issuance of notice u/s 148 of the IT Act and not during any proceedings subsequent thereto. Therefore, we hold that the notice u/s 148 of the IT Act is invalid and consequently the reassessment proceedings are also invalid. Therefore, the ground of appeal No. 2 is allowed. Since, we have held reassessment proceedings u/s 147 of the IT Act to be

invalid, the grounds of the appeal on merits of the addition are not adjudicated at this stage.

14. In the result, the assessee's appeal is partly allowed.

Pronounced in the open court on 24<sup>th</sup> January, 2018.

Sd/-

**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

Sd/-

**(P. MADHAVI DEVI)**  
**JUDICIAL MEMBER**

Hyderabad, Dated: 24<sup>th</sup> January, 2018

KRK

- 1 GAR Corporation Pvt Ltd., "Laxmi", 8-2-682, Road No. 12, Banjara Hills, Hyderabad.
- 2 Dy CIT, Circle-2(2), Hyderabad.
- 3 CIT(A)-9, Hyderabad
- 4 Pr.CIT (Central), Hyderabad.
- 5 The DR, ITAT Hyderabad
- 6 Guard File