

**आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम**

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री वी. दुर्गा राव, न्यायिक सदस्य एवं  
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &  
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.508/VIZ/2017  
(निर्धारण वर्ष/Assessment Year : 2012-13)**

M/s G.M.Constructions  
C/o Sunil Kumar Gautam  
18-36-1, Kothasalipeta  
Maharanipeta  
Visakhapatnam  
**[PAN : AAKFG5978M]**

Vs. Commissioner of Income Tax  
Visakhapatnam

**(अपीलार्थी/ Appellant)**

**(प्रत्यर्थी/ Respondent)**

अपीलार्थी की ओर से/ Appellant by  
प्रत्यर्थी की ओर से / Respondent by

: Shri G.V.N.Hari, AR  
: Shri D.K.Sonowal, CIT DR

सुनवाई की तारीख / Date of Hearing

: 13.06.2019

घोषणा की तारीख/Date of Pronouncement

: 03.07.2019

**आदेश /ORDER**

**Per Shri D.S.Sunder Singh, Accountant Member :**

Delay : The assessee filed appeal with the delay of 123 days. The assessee filed petition for condonation of delay assigning medical reasons. The assessee also enclosed the medical certificate stating that Managing Partner, Mr. Sunil Kumar Gautam fell sick and was advised rest from the

period 01.06.2017 to 30.09.2017. Therefore, requested to condone the delay and admit the appeal.

We have heard both the parties and condone the delay since the reason explained by the assessee is convincing and genuine.

2. This appeal is filed by the assessee against the order of the Principal Commissioner of Income Tax-1 [Pr.CIT]-1, Visakhapatnam vide F.No.Pr.CIT-1/VSP/263/2016-17 dated 27.03.2017 for the Assessment Year (A.Y.) 2012-13.

3. All the grounds of appeal are related to the order passed by the Pr.CITu/s 263 of the Income Tax Act, 1961 (in short 'Act'). In this case, the assessee filed the return of income declaring total income of Rs.28,80,000/- on 30.09.2012. The assessment was taken up for scrutiny and completed u/s 143(3) on total income of Rs.95,99,135/-. One of the additions made by the AO in this case is the disallowance u/s 40(a)(i) of the Act for making payments to Smt. Bellala Kavitha (NRI) and Smt. Ippili Chiatanya (NRI) for failure to deduct tax at source on payments made to the Non-Resident Indians. The Pr.CIT, Visakhapatnam has taken up the case for revision and found that the assessee had entered into development agreement dated

30.06.2009 with two NRIs i.e. Smt.Bellala Kavitha and Sri Garapati Ramachandra Murty, both were represented by GPA holders. As per the development agreement, the assessee firm agreed to pay Rs.22,00,000/- and Rs.20,00,000/- to NRIs along with two flats each to the first and second site owners respectively. The first site owner Smt.Bellala Kavitha had received Flat No.202 and Flat No.301 each admeasuring 1059 sq.ft, and the second site owner Shri Garapati Ramachandra Murthy had received Flat No.302 and Flat No.401 each admeasuring 1059 sq.ft, thus, the two site owners got the built up area of 2118 sq.ft each apart from the cash consideration of Rs.42,00,000/-. The Ld.Pr.CIT is of the opinion that the assessee firm should deduct the tax at source for both the transactions as per section 195 of the Act, i.e. for payments made in cash and the payments made in kind. As the assessee firm failed to deduct tax at source on the value of the built up area received by the site owners, the Ld.Pr.CIT held that the assessment made u/s 143(3) was erroneous and prejudicial to the interest of the revenue. Accordingly the Ld.Pr.CIT directed the AO to disallow the expenditure relating to the cost of construction of 4,236 sq.ft. @800/- per sq.ft.. which works out to Rs.33,88,800/- u/s 40(a)(i) of the Act and add the same to the income already assessed in the assessment order

dated 27.03.2015. Accordingly, the Ld.Pr.CIT set aside the order of the AO and directed the AO to revise the assessment order as per the directions specified.

4. Against the order of the Ld.Pr.CIT, the assessee filed appeal before this Tribunal. During the appeal hearing, the Ld.AR argued that in the assessment proceedings, the AO has called for the details of the development agreement and examined the issue in detail. After examining the development agreement, the AO disallowed the actual cash payments of Rs.42,00,000/- made to the NRIs u/s 40(a)(i)/40A(3) of the Act for non deduction of tax at source/or for cash payments. Since the AO has called for the details, examined the issue, the Ld.AR argued that there is no error in the order passed by the AO and the case does not fall under the purview of section 263 of the Act. Even otherwise, the Ld.AR submitted that the development agreement is entered on 30.06.2009 relating to the financial year 2010-11 and as per the development agreement, the construction required to be completed within 24 months i.e. before the financial year 2012-13. In the impugned assessment year, the assessee has not received the built up area hence the question of deduction of tax at source does not arise. The Ld.AR invited our attention to section 195 of the Act, wherein,

the Act provides for non-deduction of tax at source at the time of payment. The Ld.AR argued that since the payment was not made by the assessee to the land owners in the year under consideration, the question of attracting section 195 does not arise. The Ld.AR further invited our attention to page No.33 of the paper book, wherein the Income Tax Officer (International Taxation) has examined the assessee's case for default u/s 201/201(1A) vide order dated 30.03.2018, wherein the Income Tax Officer determined the tax liability on Rs.42,00,000/- only and did not consider the built up area which is transferred to the land owners. Therefore, the Ld.AR argued that from the above information also, it is clear that there is no case for applying the provisions of section 195 of the Act as well as the disallowance to be made u/s 40(a)(ia) of the Act. Therefore, argued that the Ld.Pr.CIT has committed an error in holding that the order passed u/s 143(3) is erroneous and prejudicial to the interest of the revenue, hence requested to quash the order u/s 263 and allow the appeal of the assessee.

5. On the other hand, the Ld.DR vehemently opposed to set aside the order of the Ld.Pr.CIT and argued that in the instant case, land owners have entered into agreement with the assessee for cash payment of Rs.42 lakhs as well as transfer of built up area of 4,236 sq.ft. to the NRIs. As per the

provisions of section 195 of the Act, both the payments made in cash as well as the payment made by any other mode required to be brought to tax. Though the AO has rightly applied the provisions of section 40(a)(ia) for cash component, but has not applied his mind with regard to the payment made by transfer of built up area. Non examination of the issue is an error on the part of the AO and since the taxable income has not brought to tax, the same is prejudicial to the interest of the revenue, therefore, argued that the Ld.Pr.CIT has rightly invoked the provisions u/s 263 and directed the AO to make addition u/s 40(a)(ia) relating to the transfer of built up area to the land owners. Hence, argued that no interference is called for in the order of the Ld.Pr.CIT and requested to uphold the order of the Ld.CIT.

6. We have heard both the parties and perused the material placed on record. A survey u/s 133A was conducted in the business premises of the assessee. During the course of survey, the AO examined the entire material placed before him and the assessee also admitted additional income of Rs.30 lakhs towards the defects found during the course of survey. Accordingly, the assessee filed the return of income admitting additional income as evidenced in para No.3.1. of the assessment order. As seen from para 5.1. of the assessment order, the AO has called for the details of the

development agreement dated 30.06.2009 which was entered with Smt. Bellala Kavitha and Smt.Ippili Chaitanya for a consideration of Rs.42,00,000/- along with built up area i.e. flats 202 and 301 to owner No.1 and 302 and 401 to owner No.2. The AO has also found from the ledger account that the assessee has made payments in cash to the land owners and accordingly disallowed the sum of Rs.16 lakhs u/s 40A(3) of the Act. The AO also examined the deductability of tax u/s 195 of the Act in case of landlords and observed that the cash payments of Rs.42 lakhs made without deduction of TDS attracts the provisions of section 195 and section 40(a)(ia) of the Act, accordingly assessed the cash component payment made to the landlords. From the above paragraphs of the assessment order, it is inferred that the AO has examined the issue under section 195 with regard to payments made to the landlords as well as the contents of the development agreement and transfer of the flats to the landlords and held that only the payment made during the financial year under consideration is to be taxed, but not the payments due. The Ld.AR also argued that as provided u/s 195 of the Act, only payment made attracts tax, but not the pending payments. For the sake of clarity and convenience, we

extract relevant part of the provisions of section 195(1) of the Act which reads under :

*195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in [section 194LB](#) or [section 194LC](#)) or section 194LD or any other sum chargeable under the provisions of this Act not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*

6.1. On perusal of section 195(1) of the Act, it shows that the payments made to the NRIs required to be applied for the deduction of tax at source, but not the pending payments or payments due. In the instant case, the development agreement is entered on 30.06.2009, relevant to the F.Y. 2010-11 and A.Y.2011-12. As per the agreement, the construction should be completed within 24 months. There was no finding in the assessment order or the Ld.Pr.CIT order that with regard to handing over the built up area to the Non Resident Indians. Therefore, there is no evidence to show that the developer has handed over the flats to the landlords in the assessment year under consideration. In the circumstances of deduction of tax at source u/s 195 does not arise. The order passed by the Income Tax Officer (International Taxation) u/s 201/201(1A) which is available in page No.33 of the paper book also support that the assessee is

not liable to deduct the TDS in the impugned A.Y. on the flats. Therefore, we are of the considered view that there is no error in the order passed by the AO which requires revision. Hence, we set aside the order of the Ld.Pr.CIT passed u/s 263 and restore the assessment order passed u/s 143(3) on 27.03.2015. Accordingly, the appeal of the assessee is allowed.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 3<sup>rd</sup> July 2019.

<p>Sd/-  <b>(वी.दुर्गा राव)</b>  <b>(V. DURGA RAO)</b></p>	<p>Sd/-  <b>(डि.एस. सुन्दर सिंह)</b>  <b>(D.S. SUNDER SINGH)</b></p>
<p><b>न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER</b></p>	
<p>विशाखापटणम /Visakhapatnam</p>	
<p>दिनांक /Dated : 03.07.2019</p>	
<p>L.Rama, SPS</p>	

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee- M/s G.M.Constructions, C/o Sunil Kumar Gautam  
18-36-1, Kothasalipeta, Maharaniipeta, Visakhapatnam
2. राजस्व/The Revenue –Commissioner of Income Tax, Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Visakhapatnam
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 5.गार्डफ़ाईल / Guard file

// True Copy //

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam