IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI

BEFORE SHRI AMARJIT SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 3367/MUM/2019
Assessment Year: 2014-15

M/s Mangalam Developers, Shop No. 38, Plot No. 17/18, Gautam Complex, Sector-11, CBD Belapur Navi Mumbai-400614.	Vs.	Pr. Commissioner of Income Tax-28, 3rd Floor, 6th Tower Vashi Railway Station Complex Vashi, Navi Mumbai-40073
PAN No. AATFM2007L **Appellant**		**Respondent**

Assessee by	:	Mr. C.V. Jain, AR
Revenue by	:	Mr. Narendra Singh Jangpangi, CIT DR
Date of Hearing	:	17/12/2019
Date of pronouncement	:	30/12/2019

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2014-15. The appeal is directed against the order passed by the Pr. Commissioner of Income Tax-28 Mumbai [in short 'Pr. CIT'] u/s 263 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. On the facts, in the circumstances of the case and in law, the Pr. CIT has erred in directing the assessing officer to pass a fresh assessment order, though the

original assessment order passed u/s 143(3) was neither erroneous nor prejudicial to the interest of the revenue.

2. In view of the facts and circumstances of the case, the Pr. CIT has erred in invoking provisions of section 263 without considering the fact that the assessing officer had passed the original order u/s 143(3) after making proper inquiries, investigation and examinations.
3. Without prejudice to the other grounds of appeal, the Pr. CIT has erred in not considering the fact that the date of agreement fixing the value of the asset was prior to the date of registration of such transfer and payment was received by cheque, where the value for the purpose of payment of stamp duty on the date of agreement was not above the full value of consideration received, so provision of section 43CA were not applicable to the facts and circumstances of the case.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2014-15 on 29.11.2014 declaring total income at Rs.3,52,897/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 13.10.2016 assessing the income at Rs.3,52,900/-. On perusal of the records, it is found by the Pr. CIT that the assessee is a builder and developer and the properties were sold below the market value ; the provision of section 43CA of the Act is applicable in this case.

Observing that section 43CA clearly mentions that where consideration for the transfer of an asset (other than capital asset) being land or building or both, is less than the stamp duty value, the value so adopted (or assessed or assessable) shall be deemed to be the value of consideration for the purposes of computing income under the head 'profits and gains of business or profession', the Pr. CIT found that in the present case it has resulted in under assessment of Rs.70,77,475/-. Therefore, holding that the order dated

13.10.2016 passed u/s 143(3) by the AO is erroneous in so far as it is prejudicial to the interests of revenue within the meaning of section 263 of the Act, the Pr. CIT set aside the order passed by the AO with a direction to pass fresh assessment order, if necessary, after conducting proper verification/inquiry, investigation and examination in accordance with law and after affording an opportunity of being heard to the assessee.

4. Before us, the Ld. counsel for the assessee files a *Paper Book (P/B)* containing (i) Notice u/s 142(1) dt 14/08/2015, (ii) Notice u/s 143(2) dt 31/08/2015, (iii) Notice u/s 142(1) dt 01/03/2016, (iv) Reply to notice u/s 142(1) dt 22/03/2016, (v) Notice u/s 142(1) dt 29/07/2016, (vi) Reply Letter dt 19/09/2016, (vii) Reply Letter dt 26/09/2016, (viii) Reply Letter dt 27/09/2016, (ix) Details of Registration of Documents during the year (x) Notice u/s 142(1) dt 29/08/2018, (xi) Reply Letter dt 07/09/2018, (xii) Reply Letter dt 01/10/2018 (xiii) Reply Letter dt 13/10/2018.

Reliance is placed by him on the order of the Tribunal in *Smt. K. Krishnaveni v. ITO* (ITA No. 548/Hyd/2013) ; *Shri Narayan Tatu Rane v. ITO* (ITA No. 2690/Mum/2016) ; *Shri S. Murugan v. ITO* (ITA No. 610/Mds/2011); *M/s Indus Best Hospitality & Realtors Pvt. Ltd. v. Pr. CIT* (ITA No. 3125/Mum/2017) ; the judgment dated 16.08.2010 of the Hon'ble Delhi High Court in *CIT v. M/s Vikas Polymers* (ITR 3/1991), and *CIT v. International Travel House Ltd.* (ITA No. 94/2010)

On the basis of the above submissions, the Ld. counsel submits that in the instant case the AO had passed the original order u/s 143(3) after making

proper inquiries, investigation and examinations and therefore, the order u/s 263 is not called for.

Further, the Ld. counsel explains that in the instant case the date of agreement fixing the value of the asset was prior to the date of registration of such transfer and payment was received by cheque, where the value for the purpose of payment of stamp duty on the date of agreement was not above the value of consideration received and therefore, the provision of section 43CA is not applicable to the facts and circumstances of the case.

5. On the other hand, the Ld. Departmental Representative (DR) refers to para 6 of the order u/s 263 dated 29.03.2019 passed by the Pr. CIT and submits that a perusal of the preamble of the agreement for sale dated 06.05.2013 executed between the assessee and Mrs. Sunita S. Ghorpade goes to so that the permission to develop and construct the building was granted by CIDCO vide its order number CIDCO/BP/ATPO/349 dated 19.05.2011 and since the assessee received commencement certificate on 19.05.2011, it is improbable how the agreement for sale can be executed on 10.01.2011.

Again further referring to para 6.2 of the impugned order, the Ld. DR submits that during the course of proceedings u/s 263, the assessee was asked by the Pr. CIT to establish with supporting documentary evidence that it received part payments from the said parties to whom it sold the flats/shops in contravention of section 43CA. However, in response to it, the assessee submitted copies of payment receipts issued to the flat/shop buyers, but these did not properly show the acknowledgement by the said parties. It is mentioned by the Ld. DR that the assessee failed to produce before the Pr. CIT

the agreements for sale except that of Sunita S. Ghorpode, although specifically asked for. For want of evidence of receipt of part payment from the said flat/shop purchasers, the provision of section 43CA is applicable in the instant case.

In view of the above findings, the Ld. DR supports the order passed by the Pr. CIT.

6. We have heard the rival submissions and perused the relevant material on record. The reasons for our decisions are given below.

We discuss now the case laws relied on by the Ld. counsel. In the case of *Smt. K. Krishnaveni* (supra), the assessee filed return of income for the AY 2008-09, admitting taxable income of Rs.1,69,920/- and agricultural income of Rs.11,53,010/-. Scrutiny assessment was completed on 23.12.2010. During the course of scrutiny assessment proceedings, the AO found that the assessee who owned land of 772 sq. yards at Phase I & II at KPHB Colony, Kukatpally, Hyderabad entered into a development agreement with M/s Chekri Projects Pvt. Ltd. on 15.03.2008. During the course of assessment proceedings, the assessee submitted before the AO reply to the notice u/s 142(1) stating that as consideration cannot be determined and received by the assessee in FY 2007-08, it did not amount to transfer of the assessee's land to the developer, that the transaction was outside the ambit of section 2(47) consequent to which there was no question of taxation of capital gains in the assessment year 2008-09. The Tribunal observed *inter alia* that the assessee has offered the capital gains tax in the next year and there has not been any prejudice to the revenue ; further the assessee has explained to the query raised during the

scrutiny proceedings before the AO and answered to the satisfaction of the AO and hence the order is not erroneous.

In *Shri Narayan Tatu Rane* (supra), the assessee originally filed returns of income for the AYs 2007-08 and 2008-09 u/s 139(1) of the Act. Subsequently, on receipt of information from a search and seizure operation conducted by the Department in the case of M/s R.N.S. Infrastructure Ltd. on 16.02.2012, the AO re-opened the assessment and then completed it u/s 143(3) r.w.s. 147 of the Act, accepting the explanation of the assessee that the said incriminating documents do not relate to him. In order u/s 263, the Pr. CIT held that the AO did not examine and verify the issues by co-relating the evidences found during the course of search conducted in the hands of R.N.S. Infrastructure. Therefore, he held the assessment order passed by the AO as erroneous and prejudicial to the interests of revenue. The Tribunal held that in the instant case the Pr. CIT has failed to show that the assessment order passed by the AO were not only erroneous but also prejudicial to the interests of revenue. Observing that both the above conditions are required to be satisfied before invoking the revisional powers u/s 263, the Tribunal held that the Pr. CIT has failed to show that both the conditions exist in the instant case. Accordingly, the Tribunal set aside the order u/s 263 passed by the Pr. CIT.

In *Shri S. Murugan* (supra), as per the AIR information received by the Department, it was found that the assessee had sold a property in the year under reference for a consideration of Rs.34,00,000/-. Inquiries made by the AO revealed that the property had been purchased and sold in assessee's name, thus the income arising from such transaction is required to be taxed in

assessee's hands. As per the CIT, the AO has accepted the assessee's contentions regarding the existence of AOP, without verifying the facts pertaining to the entire transaction, therefore, he proposed to revise the assessment order holding it to be erroneous as well as prejudicial to the interest of the revenue. The Tribunal held that in this case, the AO has examined the issue from all angles, therefore, the order cannot said to be erroneous on account of non application of mind, and hence, one of the twin conditions precedent to revise an order is missing. Thus it held that the assessment order in question cannot be revised.

In *M/s Indus Best Hospitality & Realtors Pvt. Ltd*.(supra), the assessee has challenged the order u/s 263 passed by the CIT on the issue of land development charges amounting to Rs.50,60,000/- giving to Smt. Sumitraben Chauhan. The CIT has revised the order passed u/s 143(3) by the AO by directing him to re-examine the same afresh. The Tribunal held that the issue with respect to the claim of interest expenditure had been thoroughly examined by the AO by calling for the specific details and explanations on the issue involved and having satisfied with the claim of the assessee, the deduction was allowed by the AO. Therefore, the Tribunal held that the revision proceedings u/s 263 by the CIT even with respect to the interest expenditure directing the AO to re-examine the same is incorrect and un-justified.

In *M/s Vikas Polymers* (supra), the AO completed the assessment for AY 1982-83 on a total income of Rs.90,031/- as against the returned income of Rs.69,500/-. The CIT passed an order u/s 263 on the reason that while

completing the assessment, the AO did not inquire into the genuineness of the capital investments of the two partners, Smt. Ratni Dvi and Shri Sagar Mal Bardie for the sums of Rs.49,000/- and Rs.40,000/- respectively, and un-secured loans of Rs.98,500/- taken from M/s Stutee Chit & Finance (P.) Ltd. The Hon'ble High Court held *inter alia* that the assessee explained that the capital investment made by the partners, which had been called in question by the Commissioner, was duly reflected in the respective assessments of the partners who were income tax assessees and the un-secured loan taken from M/s Stutee Chit & Finance (P.) Ltd. was duly reflected in the assessment order of the said Chit Fund which was also an assessee. Thus the reference was held in favour of the assessee and against the revenue.

In *International Travel House Ltd*. (supra), the assessee filed its return of income for the AY 2003-04 on 28.11.2003 declaring income of Rs.3,37,35,806/- and long term capital gain of Rs.7,788/-. The assessee-company, a travel agent and tour operator incurred expenditure of Rs.4,02,421/- on foreign travel and it submitted details of foreign travelling undertaken by it before the AO. In the assessment, the AO held that the assessee had not filed any detail which would confirm the fact that it had obtained business in the result of the above foreign travelling and accordingly opined that the expenditure would not come within the exemption provisions. The AO disallowed 50% i.e. Rs.2,01,210/- and added the same to the total income of the assessee. The CIT on examination of records noticed that the assessment order was *prima facie* erroneous and prejudicial to the interests of the revenue and accordingly issued show cause notice u/s 263 of the Act. The assessee contended before the CIT that it had merely claimed credit of TDS ;

that it had booked tickets in various airlines for its customers for which it received commission from the airlines @ 7% on international air tickets and 5% on domestic air tickets purchased ; that the assessee received performance linked bonus and overriding commission on sale of air tickets ; that a part of the commission is passed on to the customers by way of discounts and the net commission was shown in the books of accounts and offered to tax by the assessee. However, the CIT held that as per the TDS certificate, the total amount credited was Rs.27,46,18,000/-, whereas in the P&L account, the assessee had credited only Rs.11,93,39,485/- and that had led to a mistake committed by the AO which had eventually resulted in under assessment of income to the extent of Rs.15,52,78,515/-. The Hon'ble High Court held that in this case the Commissioner has really made an effort to cause a routine inquiry with regard to the matter that had already been concluded ; the Commissioner has thought that he has the authority to begin a fresh litigation because of the view entertained by him, whereas, the aforesaid inexhaustible approach is not permissible and he was required to arrive at a definite conclusion but he had not done so. The Hon'ble High Court thus dismissed the appeal filed by the Revenue.

6.1 The assessment order in the present case is worth mentioning and it is as under :

> "The return of income was filed for the A.Y. 2014-15 on 29/11/2014 declaring total income at Rs.3,52,897/-. The same was processed u/s 143(1). The case was selected for scrutiny under CASS. Accordingly, notice u/s 143(2) of the Act was issued on 31/08/2015 which was duly served upon the assessee. Thereafter, notices u/s

142(1) of the Income Tax Act, 1961 calling for some details were issued from time to time.

2. In response to the aforesaid notices, the assessee filed the details as called for. The details furnished during the course of assessment are placed on record.

3. The assessee firm is engaged in business as Builders and Developers and during the year has income from the said activity.

4. After perusal of details filed, the total income of assessee computed as under :

Income from business		Rs.3,52,807/-
	Total Income	**Rs.3,52,897/-**
	Rounded off	**Rs.3,52,900/-**

4. Assessed u/s. 143(3) (ii) of the Income Tax Act, 1961 accordingly. Credit given for pre-paid taxes. Charged interest u/s 234A, 234B, 234C and 234D as applicable. Issued Demand notice / refund order accordingly."

6.2 Let us now turn to section 43CA of the Act. The Finance Act, 2013 inserted section 43CA to provide that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business or profession". The Finance Act, 2013 has also provided that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not the same, the stamp

duty value may be taken as on the date of the agreement for the transfer and not as on the date of registration for such transfer.

We find that the AO in the instant case has not examined the above provisions of the Act. This is evident from the documents leading to the assessment order and also from the assessment order extracted above. Tellingly, therefore the present case is distinguishable from the case-laws relied by the Ld. counsel as narrated here-in-before.

6.3 As mentioned earlier, the Pr. CIT has specifically mentioned at para 6.2 of the impugned order that in response to a query raised by him to establish with supporting documentary evidence that it received part payments from the said parties to whom it sold the flats/shops in contravention of section 43CA, the assessee failed to produce the agreements for sale except the one in the case of Sunita S. Ghorpode. Therefore, specifically he directed the AO to verify the documents and ascertain whether the assessee has received any amount against the sale of said flats in the earlier year, in which the assessee claims to have issued the allotment letter and received the payment and to ascertain whether provisions of section 43CA are applicable or not.

6.4 In the instant case, the Pr. CIT while setting aside the assessment order had only remanded the matter to the AO and the assessee could effectively participate in the proceedings before the AO and put forth all his objections and hence no prejudice whatsoever would be caused to him.

In the instant case, the Pr. CIT has directed the AO to observe the rules of natural justice and to provide opportunity of hearing to the assessee before

making a fresh assessment order on merits. This would adequately safe guard the interest of the assessee and would cause no prejudice. The order of revision is held valid.

Therefore, the Pr. CIT has rightly passed the order u/s 263 of the Act and we affirm it.

7. In the result, the appeal is dismissed.

Order pronounced in the open Court on 30/12/2019.

Sd/-	Sd/-
(AMARJIT SINGH) JUDICIAL MEMBER	(N.K. PRADHAN) ACCOUNTANT MEMBER

Mumbai;
Dated: 30/12/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai