आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SMT. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 1574/Ahd/2014

(**निर्धारण वर्ष /** Assessment Year : 2009-10)

Smt. Virbalaben Kiritbhai Patel 44, Meghdoot Society, Karelibaugh, Baroda 390018	**बनाम**/ Vs.	**DCIT** Circle - 5, Baroda
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADFPP0275Q		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Vijay Ranjan, A.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Smt. Aparna Agarwal, CIT. D.R.

सुनवाई की तारीख / **Date of Hearing**	20/11/2019
घोषणा की तारीख /**Date of Pronouncement**	22/01/2020

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax - III, Ahmedabad ('CIT' in short), dated 28.03.2014 arising in the assessment order dated 19.12.2011 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2009-10.

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

"1. The order u/s. 263 of IT Act passed by the Commissioner of Income - Tax, Baroda - III is bad in law & deserved to be

quashed, as the assessment order passed by assessing officer was not erroneous & pre - judicial to the interest of revenue.

2. *The Commissioner has erred in law and on facts in directing the assessing officer to verify the under consideration amounting by Rs. 78,76,580/- towards the sale proceeds relating to sale of non-agriculture land & the same deserves to be uncalled for.*

3. *The Commissioner has erred in law and on facts in directing the assessing officer to verify the consultancy charges paid to Mangala Property & Development expenses to Chetan Builders amounting to Rs. 1.5 Crores & Rs. 29.61 lacs respectively & the said action deserves to be uncalled for."*

3. Briefly stated, the assessee is in the business of development of property. For the AY 2009-10 in question, the assessee filed return of income declaring total income at Rs.2,73,74,980/-. The return filed by the assessee was selected for scrutiny assessment and the assessment was framed under s.143(3) of the Act at the same amount at Rs.2,73,74,980/- vide order dated 19.12.2011. Subsequent to the assessment, on verification of records, it was found by the Commissioner of Income tax that the assesee has reported the sale transactions at a lower figure by Rs.78,76,580/- for taxation which resulted in under assessment causing prejudice to the interest of the Revenue. The CIT secondly observed that the assessee has claimed payment of Rs.1.99 Crores in aggregate to the following persons who are covered under the provisions of Section 40A(2)(b) of the Act *viz.* (a) consulting charges paid to Mangla Properties Rs.1.57 Crore; & (b) development expenses paid to Chetan Builders Rs.29.61 Lakhs.

4. The CIT accordingly issued show cause notice under s.263 of the Act to the assessee seeking explanation in this regard. The assessee filed written submissions in response thereto which was reproduced in the revisional order of the CIT appealed against. The CIT however did not concur with the justifications advanced by the assessee. As noted by CIT with reference to first issue, sale receipts, as per agreement/banakhat, the total sale receipts stands at Rs.5,33,21,000/- whereas the assessee has declared sale transaction to the extent of

Rs.4,54,44,420/- only resulting in under assessment. The CIT did not find the explanation of the assessee that the difference amount represents payment to land owners and other legal expenses towards cost of acquisition of such land to be satisfactory. As regards the second issue, the revisional CIT observed that expenditure incurred on payments to assess concerns under s.40A(2)(b) of the Act has not been examined. It was also not examined that the transactions have been carried out arm length. The CIT further alleged that the counts of the recipients were also not examined by the AO to ascertain the Revenue loss from such transactions. The CIT accordingly found the assessment order passed under s.143(3) of the Act to be erroneous as well as prejudicial to the interest of the Revenue on both the scores. The assessment order under revisional was accordingly set aside and the AO was directed to re-determine the issues involved when pass a fresh assessment order after proper verification.

5. Aggrieved by the order of the CIT passed under s.263 of the Act dated 28.03.2014, the assessee preferred appeal before the Tribunal.

6. Adverting to the first limb of allegation, the learned AR for the assessee, at the outset, submitted that the ingredients of Section 263 of the Act is not fulfilled at all and therefore, CIT has wrongly assumed the jurisdiction under s.263 of the Act. The learned AR submitted that the assessment order which was subject matter of revision by the Commissioner is neither erroneous nor prejudicial to the interest of the Revenue. The learned AR adverted our attention to a tabulated statement in para 2.1 (page 3) of the revisional order as submitted before the Commissioner read with respective purchase agreements executed with vendors in relinquishment of their rights in land produced before AO to justify the cost associated with acquisition of land. The learned AR adverted our attention to the purchase agreement placed at page Nos. 51 & 124 of the paper book in this regard. The references were made for incurring other expenses associated with cost of acquisition. It was thus submitted on facts that the cost incurred for acquisition of land is

required to be deducted for determination of correct profit which is what was done by the assessee albeit through an erroneous presentation of accounts. It was conceded that the assessee ought to have declared the full sale consideration of Rs.5,33,21,000/- on the receipt and should have simultaneously deducted Rs.78,86,580/- towards cost of acquisition instead of netting of the two figures. The learned AR however insisted that such erroneous presentation of accounts has no impact whatsoever on the resultant income declared by the assessee and therefore no prejudice can be said to have caused to Revenue on account of improper accounting method adopted. We find apparent merit in the aforesaid plea of the assessee towards first part of the allegation. Needless to say, the profit on sale of land can be deduced only after subtraction of corresponding purchase costs. It is not the case of the Revisional Commissioner that purchase cost has been separately claimed. We further take note of the claim made on behalf of the assessee that relevant facts towards cost associated with the acquisition aggregate to Rs.78,86,580/- were placed before the AO in the course of assessment. Under the circumstances, it would be reasonable to infer that AO has applied his mind to such aspect. The confusion resulted from improper accounting method whereby the sale receipts have been netted of with purchase costs and net sale consideration was wrongly shown instead of reflecting gross sale consideration and corresponding purchase cost separately, has not ultimately resulted in any under reporting of income. Therefore, no manifest prejudice has resulted to the interest of the Revenue. Therefore, we are of the opinion that the conditions for exercise of power under s.263 of the Act are not satisfied in respect of this aspect. We accordingly set aside the action of the Pr.CIT and restore the assessment order to this extent.

7. As regards second limb of allegation that consultancy charges and development charges paid to parties covered under s.40A(2)(b) of the Act, the learned AR for the assessee submitted that the revisional exercise is not justified on this score as well as the AO had made an inquiry in this regard as well. The learned AR referred to the written

submissions placed before the Revisional Commissioner and submitted that the agreement was executed between the assessee and Mangla Properties for incurring consultancy charges of Rs.1,57,00,000/- in question. Similarly, the assessee has incurred Rs.29,61,000/- towards development incurred paid to Chetan Builders in the course of development business. It was submitted that the expenses were incurred for carrying out cleaning and labeling work of land and also doing fencing work and removing unauthorized encroachments on the land. For this service, a payment of Rs.29,61,000/- was paid to Chetan Builders. It was insisted that the tax rates in the hands of assessee as well as the sister concern i.e. Mangla Properties Pvt. Ltd. and Chetan Builders are in the same range and therefore the entire exercise is revenue neutral. The learned DR strongly defended the action of the CIT and submitted that the plea raised on behalf of the assessee is without any traction as noted in the revisional order.

8. We have carefully considered the rival submissions on the maintainability of revisional action towards payment made to sister concern as noted above. The revisional CIT has alleged that the AO has not made any inquiry towards the nature of services rendered and the genuineness and reasonability of the expenditure incurred for payments made to parties covered under s.40A(2)(b) of the Act. We concur with the allegation of the CIT in this regard. The assessee has failed to adduce any evidence towards inquiry made in this regard by the AO in the course of the assessment. Thus, the action of the AO was marred with the lack of application of mind. The essence of agreement entered into with Mangla Properties as recorded in page 5 of the revisional order may be reproduced hereunder once again for ready reference:

> *"As far as consulting charges is concerned the agreement was made between the assessee & MP.P.L dated 07/06/2007 for providing various project development services, which are as follows:*
>
> *(i) Helping in carrying out the exercise of land measurement by the Government Authorities.*

(ii) Appointment of Architecture/Structural Engineer, their responsibilities, & to decide Quantum of fees or mode of payment & all other related conditions.

(iii) According to demand of current market trend, to advice the assessee.

(iv) The discussion or publicity of plan will be done by way of advertisement in newspaper, publicity agency, appointment of literature, advertisement in press, etc.

(v) Appointment of agencies regarding work of land scrapping, water harvesting, storm water, drainage system, supply of electricity, construction for build, etc & to decide their responsibilities, quantum of fees, mode of payment, terms & conditions of the done by them."

9. A bare reading of the clauses noted above would show that the so called understanding between the assessee and sister concern is quite general and non-specific. The vague and non descript clauses does not inspire any confidence in the arm length postulations explicit in Section 40A(2)(b) of the Act. The actual carrying on of services as per the agreement by the sister concern and its capability to do so, the pattern of payment made to sister concern and expenditure incurred by sister concern for carrying out such services has not been pointed out even before the Tribunal. Therefore, we are constraint to observe that AO failed to carry out the duty assigned to him on such vital aspect. Same is the case for payment made towards so called development expenses paid to Chetan Builders. No cogent evidence was shown to have been produced before the AO in justification of such expenses. The nature of services rendered with some degrees of objectivity ought to have been examined by the AO. The inaction on the part of the AO has caused prejudice to the Revenue as contemplated under s.263 of the Act. The plea of the assessee that the payment incurred towards services rendered by sister concern to be revenue neutral is also without any supporting evidence. It is not the tax rate but the tax amount in absolute figures which matters. It was for the assessee to demonstrate that the amount of tax saved on account of such expenses has been corresponding paid by the sister concern. In the absence of such demonstration, the plea of the assessee towards tax neutrality cannot be appreciated in perspective. We

thus see no error in the action of the Revisional CIT in setting aside the order of the AO for a direction to re-determine the issue in accordance with law. We thus decline to interfere on the second limb of direction connected to the expenses incurred which are susceptible to provisions of Section 40A(2)(b) of the Act.

10. In the result, appeal filed by the assessee is partly allowed.

This Order pronounced in Open Court on 22/01/2020

Sd/-	Sd/-
(MADHUMITA ROY)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 22/01/2020

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।