

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No. 335/H/2020 Assessment Year: 2009-10		
Venkata Sai Builders, Hyderabad. PAN - AAGFV 9056R (Appellant)	Vs.	Income-tax Officer, Ward - 7(1), Hyderabad. (Respondent)
Assessee by:		Shri K.C. Devdas
Revenue by:		Shri Rohit Mujumdar
Date of hearing:		17/06/2021
Date of pronouncement:		25/08/2021

ORDER

PER L.P. SAHU, A.M.:

This appeal filed by the Assessee is directed against CIT(A) - 3, Hyderabad's order dated 30/01/2020 for AY 2009-10 involving proceedings u/s 144 r.w.s. 147 of the Income- Tax Act, 1961; in short "the Act" on the following grounds of appeal:

"1. The Ld.C.I.T (A) _ 3, Hyderabad (CIT(A)) having held that the entire assessment order passed for AY. 2009-2010 u/s. 144 R.W. 147 on 15/12/2016 was without jurisdiction, bad in law and invalid and having allowed

the appeal erred in giving a direction to take necessary action to bring the escaped assessment to tax for the assessment-year 2010-2011, 2011-12 and 2012-2013 which was without jurisdiction.

2. The CIT(A) failed to note that in an appeal filed for the A Y 2009-2010 no direction could be given to re-open the assessments for AY 2010-2011, 2011-2012 AND 2012-2013 and that the direction given was not necessary for the disposal of the appeal and therefore the direction to reopen the assessments for 2010-2011, 2011-2012 and 2012-2013 has no legs to stand and must be quashed.

3. Without prejudice to Ground No: 2 the CIT(A) failed to note that under the provisions of Sec. 150(2) of the I.T Act the assessments for 2010-2011, 2011-2012 and 2012-2013 could not be re-opened as on the date of passing the Appellant order on 30/01/2020 the period of limitation to reopen the assessments was barred by time.

4. Without prejudice to any of the aforesaid grounds the ld. CIT(A)'s computation of turnover arising on sale of flats for each of the AYs 2010-11, 2011-12 and 2012-13 is disputed."

2. We notice at the outset that assessee's instant appeal suffers from 38 days delay in filing. To this effect, the ld. AR filed an affidavit wherein it was affirmed that due to COVID pandemic and consequent lockdown declared by the Govt. of India and the State Govt. caused the impugned delay in filing of the instant appeal. Case law Collector Land Acquisition vs Mst. Katiji & Ors, 1987 AIR 1353 (SC) and University of Delhi Vs. Union of India, Civil Appeal No. 9488 & 9489/2019 dated 17 December, 2019, hold that such a

delay; supported by cogent reasons, deserves to be condoned so as to make way for the cause of substantial justice. We accordingly hold that revenue's impugned delay of 38 days is neither intentional nor deliberate but due to the circumstances beyond its control. The same stands condoned. Case is now taken up for adjudication on merits.

3. Briefly the facts of the case are that the AO in his order observed that the assessee being a partnership firm, did not file its return of income for the impugned AY 2009-10 either within the time allowed u/s. 139(1) of the Act or belatedly within one year from the end of the relevant AY by availing the benefit of sec. 139(4) of the Act. As such, the assessee is a non-filer.

3.1 subsequently, the AO received a specific information from Sub Registrar Office through the Intelligence Wing of the department i.e., the DIT (I&CI), that the assessee, being a developer, had entered into a Development Agreement cum GPA, vide Document No.4943/0S dated 07.05.2008. In view of this, as the assessee did not file the return of income for the impugned AY 2009-10, the AO had reason to believe that the income chargeable to tax on account of development agreement had escaped assessment within the meaning of sec. 147 of the Act.

3.3 Accordingly, the AD issued a notice u/s. 148 of the Act dated 30.03.20016, after having obtained the prior approval of the competent authority i.e., the PCIT-3, Hyderabad. However, as there was no response to the said notice, the AO issued a notice u/s. 142(1) of the Act along with the show cause letter. As there was no response to the said notice u/s. 142(1) of the Act also, the AO resorted to completion of the assessment ex-parte u/s.144 of the Act on the basis of registered Document No.4943/08 (supra). Thus, the AO passed the impugned order u/s. 144 r.w.s. 147 of the Act dated 15.12.2016, determining the total income of the assessee at Rs.65,85,230/-. While doing so, the AO assessed the income of the assessee by making the following two additions:

1. Undisclosed investment u/s. 69 of the Act Rs. 42,34,380/-

2. Net income determined on the construction and 23,50,850/- sale of flats.

4. Aggrieved, the assessee preferred an appeal before the CIT(A).

5. The CIT(A) after considering the submissions of the assessee and calling for remand from the AO, examined the issue in depth and treated the assessment order passed by the AO u/s 144 rws 147 of the Act, as void-ab-initio.

5.1. However, the CIT(A) gave his findings and directions u/s 150 of the Act, as under:

“7.1 During the course of appellate proceedings, it is submitted by the AR of the assessee that the assessee actually completed the project in the AYs starting from AY 2009-10 to 2012-13. To be precise, the assessee received 17 flats as its share and disposed of the same during various AYs and realized the revenue to the extent of Rs. 1,64,97,000/-. The details of the same are given below for ready reference:

<i>Sl.No.</i>	<i>AY</i>	<i>No. of flats sold</i>	<i>Amount of sale consideration received in Rs.</i>
<i>1</i>	<i>2009-10</i>	<i>3</i>	<i>22,57,000/-</i>
<i>2</i>	<i>2010-11</i>	<i>3</i>	<i>23,50,000/-</i>
<i>3</i>	<i>2011-12</i>	<i>9</i>	<i>91,90,000/-</i>
<i>4</i>	<i>2012-13</i>	<i>2</i>	<i>27,00,000/-</i>
<i>Total</i>		<i>17</i>	<i>1,64,97,000/-</i>

7.2 Further, it is stated by the AR of the assessee that the assessee did not file any return of income not only for the impugned AY 2009-10 but also subsequent AYs till date. Accordingly, it is an admitted fact that the assessee has not disclosed any income on account of development of flats and sale of the same for any of the AYs, though the gross receipts on account of sale of its share of 17 flats is quantified and disclosed during the course of appellate proceedings at Rs. 1,64,97,000/-.

7.3 In view of this, during the course of appellate proceedings, the AR of the assessee was asked to explain the reasons for its failure to file the returns of income for various AYs disclosing the transactions pertaining to development of the land and sale of flats. In response thereto, it is submitted by the AR of the assessee that the assessee has actually incurred loss on account of the project and, therefore, it did not file the

return of income. However, the assessee could not adduce any evidence to demonstrate that it had incurred loss on the development of the project / flats.

7.4 I have carefully considered the submissions made by the AR of the assessee, but the same is not acceptable inasmuch as, as per the provisions of sec. 139(1) of the Act with effect from the AY 2006-07 and onwards, it is mandatory on the part of a firm to file its return of income within the due dates stipulated thereof, notwithstanding the fact that there is no taxable income Le., its income is below the taxable limits. As such, even in a case of a loss, as applicable to a company, the firm is also required to file its return of income within the due date stipulated u/s. 139(1) of the Act read with explanation 2 thereof. Under the circumstances, it is a clear violation of the provisions of the Act by the assessee firm for various AYs attracting penal provisions in terms of sec. 271F of the Act and prosecution in terms of sec. 276CC of the Act.

7.5 In view of this, during the course of appellate proceedings, the assessee was asked to furnish the details of computation of its income for various AYs and, in response thereto, the assessee has furnished only the details of the flats sold during various AYs, but without giving the income generated on account of sale of flats. In this regard, a scanned copy of the assessee's submissions giving the details of 17 flats sold during the AYs 2009-10 to 2012-13, is extracted at page No. 25 & 26 of CIT(A)'s order.

7.6 As seen from the above, it is clearly evident that the assessee has received an aggregate amount of Rs. 1,64,97,000/- as business receipts on account of sale of flats falling under its share. However, the assessee has not disclosed such transactions to the Income Tax Department by way of filing the return of income either within the due dates stipulated u/s.139(1) of the Act or belatedly u/s 139(4) of the Act. On the other hand, it is

also observed that the AO has not initiated the action in terms of sec. 147 of the Act, for other AYs 2010-11, 2011-12 and 2012-13. In view of this, I am of the considered opinion that income in respect of 14 flats to be brought to tax in the hands of the assessee in the AY 2010-11,2011-12 and 2012-13.

DIRECTION:

7.7 Accordingly, the AO is directed to take necessary action to bring the income escaped assessment, being business income, in the hands of the assessee for the AYs 2010-11, 2011-12 and 2012-13. This particular direction is being issued in terms of sec. 150 of the Act and, therefore, the limitation stipulated u/s 149 of the Act is not applicable for reopening the assessment u/s. 147 of the Act. In this regard, the reliance is placed on the following decisions:

1) B.A.R. Abdul Rehman Saheb Vs. ITO (1975) 100 ITR 541 (AP)

2) Sukh Dayal Pahwa Vs. CIT (1983) 140 ITR 206 (MP)

3) MauNa Realtors (P.) Ltd Vs. Union of India (2009) 3151TR 393 (Potno)

7.8 In all the above mentioned decisions, including the judgment of Hon'ble jurisdictional High Court, it has been judiciously held that the AO can re-open the assessment beyond the period of limitation u/s 149 of the Act, on the basis of findings and direction issued by the First Appellate Authority i.e. CIT (A), apart from the Hon'ble ITAT, Hon'ble High Court and Hon'ble Supreme Court, as the case may be.

6. Aggrieved by the order of CIT(A), the assessee is in appeal before the ITAT.

7. Before us, the ld. AR of the assessee submitted that the CIT(A) having allowed the appeal of the assessee by quashing the assessment order passed for AY 2009-10 u/s 144 rws 147 of the Act, erred in giving direction to the AO to take necessary action to bring the escaped assessment to tax for the AYs 2010-11, 2011-12 and 2012-13 which is without jurisdiction. He contended that under the provisions of section 150(2) of the Act, the assessments for AYs 2010-11, 2011-12 and 2012-13 could not be reopened as on the date of passing the appellate order on 30/01/2020, the period of limitation to reopen the assessment was barred by time.

8. The ld. DR, on the other hand, relied on the order of CIT(A).

9. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. We observe that while disposing of the appeal, the CIT(A) may consider and decide any matter arising out of the proceedings, in which order appealed against was passed, even if such matter was not raised by the taxpayer before the CIT(A). As per section 251(1)(c) of the Act, *"In any other case, he may pass such orders in the appeal as he thinks fit."* Before giving directions to the AO to take necessary action to bring the income escaped

assessment, being business income in the hands of the assessee for the AYs 2010-11, 2011-12 & 2012-13, the CIT(A) observed as under:

“It is clearly evident that the assessee has received an aggregate amount of Rs. 1,64,97,000/- as business receipts on account of sale of flats falling under its share. However, the assessee has not disclosed such transactions to the Income Tax Department by way of filing the return of income either within the due dates stipulated u/s.139(1) of the Act or belatedly u/s 139(4) of the Act. On the other hand, it is also observed that the AO has not initiated the action in terms of sec. 147 of the Act, for other AYs 2010-11, 2011-12 and 2012-13. In view of this, I am of the considered opinion that income in respect of 14 flats to be brought to tax in the hands of the assessee in the AY 2010-11,2011-12 and 2012-13.”

9.1 In view of the above, we do not find any infirmity in the directions of the CIT(A) u/s 150 of the IT Act for the AYs 2010-11, 2011-12 and 2012-13. Accordingly, we uphold the order of the CIT(A) and dismiss the ground No. 1 to 3 raised by the assessee in this regard.

9.2 As regards ground No. 4 that the CIT(A)'s computation of turnover arising on sale of flats for each of the AYs 2010-11, 2011-12 and 2012-13 is disputed, we direct the AO to examine the computation of turnover for the said AYs as disputed by the assessee. This ground is partly allowed.

10. In the result, appeal of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on 25th August, 2021.

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

Sd/-
(L. P. SAHU)
ACCOUNTANT MEMBER

Hyderabad, Dated: 25th August, 2021.

kv

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4	<i>Pr. CIT - 3, Hyderabad.</i>
5	<i>ITAT, DR, Hyderabad.</i>
6	<i>Guard File.</i>