

आयकर अपीलीय अधिकरण 'बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ITA No. 1098/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

V.P. Sivakozhunthu No. 72-74, Perumal Koil Street, Pondicherry – 605 001.	बनाम/ Vs.	DCIT Pondicherry Circle, Pondicherry.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. ABEPS-3457-N		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri T. Banusekar (CA) – Ld. AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri. P. Sajit Kumar (JCIT) –Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	21-02-2022
घोषणा की तारीख / Date of Pronouncement	:	21-02-2022

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2012-13 arises out of the order of learned Commissioner of Income Tax (Appeals), Puducherry [CIT(A)] dated 26-10-2017 in the matter of assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s. 147 of the Act on 09-06-2016. The grounds raised by the assessee read as under:

1. For that the order of the Commissioner of Income-Tax (Appeals) is contrary to law, facts and circumstances of the case to the extent prejudicial to the interest of the appellant and is opposed to the principles of equity, natural justice and fair play.
2. For that the Commissioner of income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.
3. For that the reassessment was bad in law.
4. For that the reopening was made based on a mere change of opinion.
5. For that the reopening was not based on any fresh tangible material.
6. For that the Commissioner of Income Tax (Appeals) erred in upholding the disallowance of Rs.25,00,000/-u/s.40A(3).
7. For that the Commissioner of Income-Tax (Appeals) failed to appreciate that the provisions of section 40A(3) are not invocable in the facts and circumstances of the case.
8. For that the Commissioner of Income Tax (Appeals) failed to appreciate the fact that land was purchased as investment initially and subsequently was converted into stock in trade.
9. For that without prejudice to the above, the Commissioner of Income Tax (Appeals) failed to appreciate that the said cash payments would be covered under exception in Rule 6DD(e).
10. For that without prejudice to the above, the Commissioner of Income Tax (Appeals) failed to appreciate that the said payment was made in cash since the agriculturists demanded cash payments.

2. The Registry has noted a delay of 98 days in the appeal, the condonation of which has been sought by the assessee on the strength of the condonation petition dated 17.10.2018 which is accompanied by affidavit of the assessee. It has been submitted that the concerned Chartered Accountant handling the case left the firm to take up the employment. Resultantly, the case was inadvertently missed to be attended to. The affidavit of the concerned Chartered Accountant has also been placed on record. Though Ld. DR opposed the condonation of delay, however, keeping in view the principle of natural justice, we condone the delay and admit the appeal for adjudication on merits.

3. As evident, the assessee has challenged the validity of re-assessment proceedings and also contested the disallowance u/s 40A(3) on merits.

4. The Ld. AR pleaded for quashing of the order on the ground that all material concerning the issues was placed before Ld. AO during the course of original assessment proceedings and the reopening is merely based on change of opinion. The Ld. AR submitted that Ld. AO took conscious decision not to make any additions while framing the assessment u/s 143(3). The Ld. AR also assailed the addition on merits, inter-alia, by submitting that the property was purchased as investment and it was open for assessee to maintain two different portfolios i.e., one for investment and one for business purposes.

The Ld. DR, on the other hand, submitted that legal issue of change of opinion has not been dealt with by Ld. CIT(A) in the impugned order. The Ld. DR also submitted that none of the aspects, on merits, were considered by Ld. AO during original assessment proceedings.

Having heard rival submissions and after going through the orders of lower authorities, our adjudication would be as given in succeeding paragraphs.

5.1 The returned income of Rs.85.52 Lacs was assessed u/s 143(3) on 14.11.2014 at Rs.95.06 Lacs. The assessee is stated to be engaged in the business of real estate. However, the case was re-opened on the ground that the assessee acquired certain property in cash for Rs.25 Lacs. Accordingly, the payment would not be allowable as deduction u/s 40(A)(3) of the Act. Forming a belief that the income escaped assessment, Ld. AO reopened the case and issued notice u/s. 148 on 07.08.2015 which is within 4 years from the end of relevant assessment year. The assessee's objections to reopening were rejected by way of speaking order dated 20.05.2016.

5.2 Considering the fact that the assessee was into business of real estate, the purchase of land could not be termed as investment but the purchase would only be as stock-in-trade. The same could also be inferred from the fact that the assessee converted the investment into stock-in-trade in the same year. The claim that the land was investment was only to circumvent the provisions of Section 40(A)(3) of the Act. Accordingly, the amount of Rs.25 Lacs was disallowed and added to the income of the assessee.

6. During appellate proceedings, the raised legal grounds as well as grounds on merits. However, the Ld. CIT(A) dismissed the legal grounds with observation that Ld. AO had reasons to believe that certain income chargeable to tax escapement assessment and due approvals were taken to initiate re-assessment proceedings. The assessee's plea that the land was purchased as investment was also rejected since the same was converted into stock-in-trade. Finally, the additions were confirmed against which the assessee is in further appeal before us.

7. We find that the original assessment was framed u/s 143(3) on 14.11.2014 wherein certain additions were made. During the course of assessment proceedings, notice u/s 142(1) was issued wherein the assessee was required to supply requisite information and documents. In one of the query, the assessee was directed to furnish the copy of sale deed in respect of property purchased at Villianur. The same was supplied and a translated copy of the same is also on record. In the deed, it was clearly mentioned that the property has been purchased for cash consideration of Rs.25 Lacs. The said property, as is evident from copy of Tax Audit Report & Form 3CD, was purchased as investment but converted on the same day as stock-in-trade. All these documents were

available before Ld. AO during the course of original assessment proceedings. The Ld. AO, after considering all these aspects, chose not to make any additions u/s 40A(3).

8. However, subsequently, without there being any new tangible material on record, Ld. AO formed a belief that the provisions of Sec. 40A(3) were applicable and therefore, the expenditure of Rs.25 Lacs would not be allowable to the assessee. From the perusal of recorded reasons, we find that while reopening, Ld. AO has not referred to any fresh tangible material coming into his possession subsequent to the conclusion of assessment proceedings. In such a case, the reopening would become mere review of the order which is impermissible as per the decision of Hon'ble Supreme Court in **CIT V/s Kelvinator of India Ltd. (320 ITR 561)**. We are of the opinion that the formation of belief has to be on the basis of some fresh tangible material or new information which is not the case here. This being so, reassessment proceedings are liable to be quashed on legal grounds. The Ld. CIT(A), without considering this aspect, has dismissed the legal grounds which is not correct. Therefore, on the given facts and circumstances, we would hold that the reassessment proceedings were nothing but mere change of opinion and hence, liable to be quashed. We order so. Having said this, our indulgence as to the merits of the case has been rendered academic in nature.

9. The appeal stand allowed in terms of our above order.

Order pronounced on 21st February, 2022.

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष / VICE PRESIDENT

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई/ Chennai; दिनांक/ Dated : 21-02-2022
EDN/-

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF