

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA Nos.669 & 670/Bang/2013
Assessment years : 2009-10

Shri B.Y. Raghavendra PAN: AGTPB 6097M Shri B.Y. Vijayendra PAN: ACDPV 0300M # 381, Davalagiri, II Main, 6 th Cross, RMV Extension, 80 Feet Road, Bangalore – 560 094.	Vs.	The Commissioner of Income Tax, Davangere.
APPELLANT		RESPONDENT

Assessees by	:	Shri V. Srinivasan, CA
Revenue by	:	Ms. Neera Malhotra, CIT(DR)

Date of hearing	:	02.08.2016
Date of Pronouncement	:	18.10.2016

ORDER

Per A.K. Garodia, Accountant Member

Both these appeals are filed by two different but connected assesses and both these appeals are directed against two separate orders passed by the Id. CIT (Appeals), Davangere dated 19.03.2013 for assessment year 2009-10 passed by him u/s. 263 of the Income-tax Act,

1961 ["the Act"]. Both these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. The grounds raised by the assessee in ITA No.669/B/13 are as under:-

“1. The order of the learned Commissioner of Income tax, Davangere setting aside the assessment order passed for the assessment year 2009-10 with a direction to recompute the income by making an addition of Rs 1,28,50,000/- in place of Rs 32,55,000/- in so far as it is against the appellant is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income-tax, Davangere failed to consider the fact that the appellant filed his return duly supported by his statement of accounts such as receipt and payment a/c, Income a/c, Capital a/c and Balance Sheet and these statements clearly reflect the advance tax paid by the appellant and these statements have been examined by AO.

3. The learned Commissioner of Income tax failed to observe that the difference in bank balance noticed by the learned AO arose after debiting the advance tax payments in the Daybook by the appellant.

4. The order of the learned Commissioner of Income tax amounts to giving directions to the learned AO to make the addition TWICE for the difference in bank balance.

5. The learned Commissioner of Income tax, Davangere failed to appreciate that the AO, after verification of the cash flow statement filed, stated that the appellant has admitted the availability of cash on hand for the payment of taxes.

6. The learned Commissioner of Income tax failed to inform the defects he claimed to have noticed in the cash flow statement filed by the appellant as the appellant had specifically written to the learned Commissioner of income tax to inform any variation noticed in the cash flow statement to the appellant for reconciliation.

7. The learned Commissioner of Income tax had not informed the appellant about the defects he claimed to have noticed in the cash flow statement filed before coming to the conclusion that the appellant had filed a different cash flow statement at the time of assessment.

8. The learned Commissioner of Income tax failed to notice that the statement filed before the learned AO was a statement containing cash and bank transactions whereas the statement filed before the learned Commissioner of income tax was only a cash flow statement as desired by him.

9. The revision powers under section 263 cannot be exercised by assuming that there has been non-application of mind, where the income has been computed after scrutiny under section 143(3) taking into consideration tax audit report and the certificate computing eligible relief as held by the Hon'ble Mumbai High Court in the case of *CIT v. Design and Automation Engineers* [2010] 323 ITR 632 (Bom) following *inter alia* the decision in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 (Bom).

10. For these and such other grounds that may urged at the time of hearing, the order of the Commissioner of Income tax Davangere passed u/s 263 of the IT Act 1961 for the assessment year 2009-10 may be cancelled.

11. For these and such other grounds that may urged at the time of hearing, the order of the Commissioner of Income tax Davangere passed u/s 263 of the IT Act 1961 for the assessment year 2009-10 may be cancelled.”

3. The grounds raised by the assessee in ITA No.670/B/13 are as under:-

“1. The order of the learned Commissioner of Income tax, Davangere setting aside the assessment order passed for the assessment year 2009-10 with a direction to recompute the income by making an addition of Rs 1,28,00,000/- in place of Rs 14,45,000/- in so far as it is against the appellant is opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income-tax, Davangere failed to consider the fact that the appellant filed his return duly supported by his statement of accounts such as receipt and payment a/c, Income a/c, Capital a/c and Balance Sheet and these statements clearly reflect the advance tax paid by the appellant and these statements have been examined by AO.
3. The learned Commissioner of Income tax failed to observe that the difference in bank balance noticed by the learned AO arose after debiting the advance tax payments in the Daybook by the appellant.
4. The order of the learned Commissioner of Income tax amounts to giving directions to the learned AO to make the addition TWICE for the difference in bank balance.
5. The learned Commissioner of Income tax, Davangere failed to appreciate that the AO, after verification of the cash flow statement filed, stated that the appellant has admitted the availability of cash on hand for the payment of taxes.
6. The learned Commissioner of Income tax failed to inform the defects he claimed to have noticed in the cash flow statement filed by the appellant as the appellant had specifically written to the learned Commissioner of income tax to inform any variation noticed in the cash flow statement to the appellant for reconciliation.
7. The learned Commissioner of Income tax had not informed the appellant about the defects he claimed to have noticed in the cash flow statement filed before coming to the conclusion that the appellant had filed a different cash flow statement at the time of assessment.
8. The learned Commissioner of Income tax failed to notice that the statement filed before the learned AO was a statement containing cash and bank transactions whereas the statement filed before the learned Commissioner of income tax was only a cash flow statement as desired by him.
9. The revision powers under section 263 cannot be exercised by assuming that there has been non-application of mind, where the income has been computed after scrutiny under section 143(3) taking into consideration tax audit report and the

certificate computing eligible relief as held by the Hon'ble Mumbai High Court in the case of *CIT v. Design and Automation Engineers* [2010] 323 ITR 632 (Bom) following *inter alia* the decision in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 (Bom).

10. For these and such other grounds that may urged at the time of hearing, the order of the Commissioner of Income tax Davangere passed u/s 263 of the IT Act 1961 for the assessment year 2009-10 may be cancelled.”

4. It was submitted by the Id. AR of assessee that various submissions were made by the assessee before the Id. CIT explaining that the amount of Rs.128.50 lakhs was paid by assessee by issuing bearer cheque dated 30.3.2009 which was paid by the bank on 2.4.2009 and therefore, there is no actual excess balance with the bank as on 31.3.2009 as compared to the balance with bank as per assessee's books as such bearer cheque was issued to the agriculturists to repay the advance which was taken on 23.3.2009 and the payment of advance tax was made on 24.3.2009 out of said advances taken from agriculturists. He submitted that the Id. CIT has not given any decision regarding this claim and explanation of assessee and straight away directed the AO to make addition which is not proper and correct. At this juncture, this proposition was put forward by the Bench that direction of the CIT may be modified by asking the AO to examine the claim and explanation of assessee. The Id. AR of assessee agreed to this proposition. The Id. DR of revenue supported the order of Id. CIT.

5. We have considered the rival submissions. First of all, we reproduce para No.5.3 from the order of Id. CIT in both the cases, where the facts relating to payment of advance tax are noted:-

ITA No.669/B/2013

“5.3 The error in the assessment order passed by the AO lay in the fact that while he has considered the issue the payment of advance tax in cash and the balance available in the bank in detail, he has telescoped one into another without appreciating that both are two distant points of time. The advance tax payments made in cash are on the following dates; 24.03.2009 - Rs.85,95,000, 14.03.2009 - Rs.5,00,000, 15.12.2008 - Rs.5,00,000. Total Rs.95,95,000/-. The AO has brought to tax this amount of advance tax paid in cash as the same was not routed through bank and sources for the same were not explained. After these payments it was noticed that there is a cash deposit into bank and hence the bank balance in Corporation Bank in account 641/SB/01/000707 as on 31.03.2009 should have been taken at 1,29,14,255 instead assessee has stated the balance at Rs.64,255/- in the cash at Bank which is the balance as on 02.04.2009. The cash deposit into bank occurred after payments of advance tax and hence there is no satisfactory explanation for the cash deposit into bank.

The plea now sought to be raised by the assessee that the advances obtained from agriculturists for sale of land and that on the failure of such transactions the advances were returned is not substantiated by the assessee as brought out above as the explanation provided at the time of assessment differs with the explanation now sought to be given.”

ITA No.670/B/2013

“5.3 The error in the assessment order passed by the AO lay in the fact that while he has considered the issue the payment of advance tax in cash and the balance available in the bank in detail, he has telescoped one into another without appreciating that both are two distant points of time. The advance tax payments made in cash are on the following dates; 24.03.2009 - Rs.1,07,05,000, 14.03.2009 - Rs.5,00,000, 23.11.2008 - Rs.1,50,000. Total Rs.1,17,05,000/-. The AO has

brought to tax this amount of advance tax paid in cash as the same was not routed through bank and sources for the same were not explained. After these payments it was noticed that there is a cash deposit into bank and hence the bank balance in Vijaya Bank in account 117801010019429 as on 31.03.2009 should have been taken at 1,28,32,493 instead assessee has stated the balance at Rs.32,493/- in the cash at Bank which is the balance as on 04.04.2009. The cash deposit into bank occurred after payments of advance tax and hence there is no satisfactory explanation for the cash deposit into bank.

The plea now sought to be raised by the assessee that the advances obtained from agriculturists for sale of land and that on the failure of such transactions the advances were returned is not substantiated by the assessee as brought out above as the explanation provided at the time of assessment differs with the explanation now sought to be given.”

6. We reproduce paras No. 6.1 & 7 from the order of Id. CIT in both the cases containing the finding and direction of Id. CIT to the AO:-

ITA No.669/B/2013

“6.1 In view of the above mentioned facts there is no option but to come to conclusion that the amount of Rs.1,28,50,000 which forms part of the balance in the Corporation Bank as on 31.03.2009 should be considered as excess of assets over liabilities and is to be brought to tax as such. The payment of taxes made earlier in cash cannot be given a set off to this amount in view of the fact that the moment the taxes have been paid there is a cash outflow which is no longer available to substantiate the balance in the bank account.

7.0 In view of this the Assessment order passed on 26.12.2011 by the AO namely the Additional Commissioner of Income-tax, Shimoga Range for A.Y. 2009-10 is set aside with a direction to AO to recompute the income by making addition of above amount of Rs.1,28,50,000, in the place of Rs.32,35,000/-.”

ITA No.670/B/2013

“6.1 In view of the above mentioned facts there is no option but to come to conclusion that the amount of Rs.1.28 crores which forms part of the balance in the Vijaya Bank as on 31.03.2009 should be considered as excess of assets over liabilities and is to be brought to tax as such. The payment of taxes made earlier in cash cannot be given a set off to this amount in view of the fact that the moment the taxes have been paid there is a cash outflow which is no longer available to substantiate the balance in the bank account.

7.0 In view of this the Assessment order passed on 26.12.2011 by the AO namely the Additional Commissioner of Income-tax, Shimoga Range for A.Y. 2009-10 is set aside with a direction to AO to recompute the income by making addition of above amount of Rs.1.28 crores, in the place of Rs.14,45,000/-.”

7. In our considered opinion, if the assessee can establish the claim regarding receipt of advance from agriculturists on a date prior to the date of payment of advance tax and the addition is ultimately made by the AO in respect of assessee's failure to establish the receipt of that advances from those agriculturists and such claim of refund to those agriculturists is by way of cheques issued on 30.3.2009 which were actually encashed from the bank on 2.4.2009, then the assessee deserves telescoping of addition made by the AO on account of payment of advance tax out of undisclosed sources of fund. But since there is no finding of the AO or of the CIT on these aspects, we think it proper to modify the directions of the Id. CIT in both the cases and accordingly we direct the AO in both the cases to examine the veracity of the claim of assessee that payment of advance tax was made by the assessee out of advances received from the

agriculturists, which the assessee failed to establish and the difference in balance as on 31.3.2009 as per bank and as per assessee's books is on this account that the cheques were issued by the assessee to those agriculturists on 30.3.2009 which were encashed by the bank on 2.4.2009. Addition should be made by the AO as per law after examining the veracity of these contentions of assessee. To this extent, the direction of the Id. CIT in both the cases stands modified.

8. In case, consequential order has already been passed by the AO as per the direction of Id. CIT in his order u/s. 263, then such modified direction of Id. CIT should be considered by the Id. CIT (Appeals) if matter is pending before CIT (Appeals) against the consequential order passed by the AO u/s. 143(3) r.w.s. 263 of the I.T. Act.

9. In the result, both the appeals by the assessee stand partly allowed for statistical purposes in the terms indicated above.

Pronounced in the open court on this 18th day of October, 2016.

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Sd/-

(A.K. GARODIA)
Accountant Member

Bangalore,
Dated, the 18th October, 2016.

/D S/

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.