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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 19.10.2023*

\+ **ITA 239/2019**

THE PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant
Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Hemlata Rawat and Ms Easha Kadian, Jr Standing Counsels.

versus

PROSPEROUS BUILDCON PVT. LTD. ..... Respondent
Through: Mr Rohit Iain, Mr Aniket D. Agrawal and Mr Saksham Singhal, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 12471/2019 ***[Application filed on behalf of the appellant/revenue seeking condonation of delay of 290 days in re-filing the appeal]***

1. This is an application moved on behalf of the appellant/revenue, seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/ revenue, there is a delay of 290 days in re-filing the appeal.

2. Mr Rohit Jain, learned counsel, who appears on behalf of the respondent/assessee, says that he does not oppose the prayer made in the application.

3. Accordingly, the prayer made in the application is allowed.

4. The application is disposed of.

ITA 239/2019

5. This appeal concerns Assessment Year (AY) 2006-07.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 01.11.2017 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. The Tribunal *via* the impugned order set aside the order dated 01.03.2016 passed by the Principal Commissioner of Income Tax [in short, "PCIT"] under Section 263 of the Income Tax Act, 1961 [in short, "the Act"].

8. To adjudicate the instant appeal, the following broad facts are required to be noticed:

8.1 On 30.11.2006, the respondent/assessee had filed its Return of Income (ROI). *Via* the instant ROI, the respondent/assessee declared its income as 'Nil'. The respondent/assessee was infact issued an intimation under Section 143(1) of the Act on 06.09.2007.

8.2 Thereafter, reassessment proceedings were triggered against the respondent/assessee. Accordingly, a notice under Section 148 of the Act was issued to the respondent/assessee on 26.03.2013. The reason for triggering the reassessment proceedings against the respondent/assessee was a search action conducted against the EMAAR MGF group of companies.

8.3 The information received by the Assessing Officer (AO) was that there had been cash withdrawals and deposits. More particularly, the information received was that cash withdrawals amounting to Rs.35.70 crores and deposits amounting to Rs.16.80 crores had been made by the respondent/assessee. However, in the reasons to believe recorded by the AO, the focus was on cash deposits amounting to Rs.16.80 crores.

9. Upon explanations being offered on behalf of the respondent/assessee, no addition was made to the declared income of the respondent/assessee against cash deposit amounting to Rs. 16.80 crores. It is at this juncture the proceeding under Section 263 of the Act was triggered by the PCIT against the respondent/assessee.

10. A Show Cause Notice (SCN) dated 06.01.2016 was issued by the PCIT under Section 263 of the Act. This time around, the basis of triggering the said proceedings was the cash withdrawals amounting to Rs.35.70 crores. The PCIT was of the view that the cash withdrawn was utilised to purchase inventory and was thus, "directly hit by the provisions of Section 40A(3) of the Act".

11. As per the PCIT, there was non-application of mind by the AO since he had not noticed the provisions of Section 40A(3) of the Act. Thus, the PCIT concluded that the twin conditions for bringing the matter under the ambit of Section 263 of the Act were fulfilled i.e., that the assessment order was erroneous and it was prejudicial to the interest of the revenue.

12. It is this order of the PCIT which, as noticed above, has been reversed by the Tribunal. What is not in dispute is that the respondent/assessee had not claimed any expenditure with regard to the cash that was withdrawn.

The reason for this was that the said money was utilised for the purchase of a parcel of land, which in the books of accounts of the respondent/assessee was shown as stock-in-trade, which in essence got neutralised being reflected in the closing stock.

12.1 Therefore, clearly the provisions of Section 40A(3) of the Act were not applicable. Thus, the order passed under Section 263 of the Act wrongly took recourse to Section 40A(3) of the Act and therefore, in our view, correctly set aside by the Tribunal.

12.2 Another aspect which the Tribunal appears to have adverted to is that if no addition was made *viz-a-viz* the deposit of Rs.16.80 crores, which was the subject matter of the reassessment proceedings, then it was not open to the AO to make an addition *qua* any other amount. In other words, if the AO did not bring to tax the amount which was adverted to in the "reason to believe" framed in the first instance, then the PCIT could not have triggered proceedings for cash withdrawals amounting to Rs.35.70 crores under Section 263 of the Act.

13. We agree with the view taken by the Tribunal on this score as well. This view is covered by the various judgments including the judgment rendered in ***Martech Peripherals Pvt. Ltd. v. Deputy Commissioner of Income Tax and Another*** [2017] 394 ITR 733 (Mad) by one of us i.e., Rajiv Shakdher, J. when sitting in the Madras High Court. The following observations being apposite are extracted hereafter:

> *"20 The petitioner-assessee, however, challenges this action of the respondents-Revenue, on the ground that it was not permissible for the respondents-Revenue to tax the forfeited share application money, by taking recourse to provisions of section 147 read with section 148 of the Act, unless it assesses to tax that income with reference to which the Assessing Officer had formed reason to believe (within the meaning of*

section 147), that it had escaped assessment.

21 To my mind, a careful reading of section 147 of the Act would show that it empowers an Assessing Officer to reopen the assessment, if, he has reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, "and also bring to tax", any other income, which may attract assessment, though, it is brought to his notice, subsequently, albeit, in the course of the reassessment proceedings.

21.1. To put it plainly, the purported income discovered subsequently during the course of reassessment proceedings, can be brought to tax, only, if the escaped income, which caused, in the first instance, the issuance of notice under section 148 of the Act, is assessed to tax:

22 ***Explanation 3****, to my mind, supports this approach, which emerges upon a plain reading of the said provision, along with the main part of section 147 of the Act. The emphasis in this behalf is on the expression "and also bring to tax" appearing in the main part of section 147 in relation to the right of the Revenue to assess taxable income discovered during reassessment proceedings. In my view,* ***Explanation 3****, clearly, expounds that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment and such other issue, that comes to his notice subsequently, albeit, in the course of proceedings held under section 147 of the Act. In other words, if, notice for reopening of the assessment was issued on one aspect, and in the course of reassessment proceedings another aspect was discovered, the reassessment order would be valid, only if, the aspect, which led to the reopening of assessment continues to form part of the reassessed income.*

23 This view, as has been correctly submitted by the learned counsel for the petitioner-assessee, has found resonance with at least three (3) High Courts, is, the Bombay High Court, the Gujarat High Court and the Delhi High Court in the following cases:

(i) ***CIT v. Jet Airways (1) Ltd.*** *(2011) 331 ITR 236 (Bom);*

(ii) ***CIT v. Mohmed Juned Dadani*** *[2013] 355 ITR 172 (Guj); Manu/GJ/0061/2013*

(iii) ***Oriental Bank of Commerce v. Addl.*** *CIT Manu/DE/1935/2014*

23.1. The only High Court, which has taken a contrary view, as it were, is the Punjab and Haryana High Court in the matter of: ***Majinder Singh Kang v. CIT*** *[2012] 344 ITR 358 (P&H); (2012) 25 taxmann.com 124 (P&H)*

*23.2. In my opinion, with respect, the court, in rendering the judgment in **Majinder Singh Kang's** case, ignored the fact that the provisions of **Explanation 3** had to be read in conjunction with the main provision, and that, the said **Explanation** cannot override the main provision.*

*23.3. This aspect of the matter has also been brought to fore by the Bombay High Court in: **CIT Jet Airways (D) Ltd.** (2011) 331 ITR 236 (Bom).*

23.4. The relevant observations made in this behalf are extracted hereafter (page 247):

> ***"However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ('such income') which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."***
>
> *(emphasis is mine)*

[See ***CIT v Mohmed Juned Dadani*** [2013] 355 ITR 172 (Guj); ***CIT v. Jet Airways (1) Ltd.*** (2011) 331 ITR 236 (Bom); and ***Oriental Bank of Commerce v. Addl. CIT*** Manu/DE/1935/2014]

14. Given the aforesaid position, we are not inclined to interfere with the impugned order.

15. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

OCTOBER 19, 2023/v

Click here to check corrigendum, if any