IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

I.T.A. No. 247/HYD/2019
Assessment Year: 2009-10

M/s.GEL Infrastructure Pvt. Limited, SECUNDERABAD [PAN: AABCG6985E]	Vs	Income Tax Officer, Ward-2(2), HYDERABAD
(Appellant)		(Respondent)

For Assessee : Shri P.Murali Mohana Rao, AR
For Revenue : Shri Sunil Kumar Pandey, DR

Date of Hearing : 22-02-2021
Date of Pronouncement : 02-07-2021

O R D E R

PER S.S.GODARA, J.M. :

This assessee's appeal for AY.2009-10 arises from the CIT(A)-1, Guntur's order dated 20-11-2018 passed in case No.0035/2015-16, in proceedings u/s.143(3) r.w.s.147 of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. The first and foremost issue that arises for our apt adjudication in the instant lis is that of validity of the impugned re-opening. This assessee is admittedly a company engaged in the real estate business. A perusal of the assessment notings suggests that the Assessing Officer had recorded his sole re-opening reasons on 21-06-2013 that 'as

per the information provided by the DIT(Int), Hyderabad, the assessee has made transactions in selling of properties during the FY.2008-09 relevant to the AY.2009-10. As verified, the assessee has not filed return of income for the AY.2009-10. Hence, I have reasons to believe that income chargeable to tax has escaped assessment within the meaning of Section 147. Issue notice u/s.148 of the I.T.Act".

3. There is no dispute that the Assessing Officer thereafter framed his re-assessment in issue dt.27-03-2015 making twin addition of un-explained investment in purchase of land of Rs.1,04,20,000/- and profit on sale of land of Rs.9,98,080/-; respectively. The CIT(A) has affirmed the same.

4. We notice from a perusal of the case file that the Forest Department of the Government of Andhra Pradesh through the DFO, Hyderabad had cancelled the assessee's sale deed itself on 20-11-2008 for the reason that the land in question was government/reserve forest land. This in our considered opinion, sufficiently takes care of the Assessing Officer's sole re-opening reason alleging escapement of income with the assessee's taxable income derived from sale of properties during FY.2008-09. No other sale deed other than that cancelled hereinabove has been executed at the assessee's behest. The Assessing Officer's corresponding sole re-opening reason does not survive anymore therefore. We observe in view of all the preceding facts that the assessee could not have been held to have derived any taxable income once the sale deed itself stood annulled by the state Government. Hon'ble apex court's landmark decision in Chainrup Sampatram Vs. CIT

(1953) [24 ITR 481] (SC) held long back that *"while anticipated loss is thus taken into account, anticipated profit …….. is not brought into the account, as no prudent trader would care to show increased profits before its realisation"* as per the conservative spectrum of accounting. We therefore hold that the Assessing Officer's re-opening reasoning itself does not hold ground in light of all these facts and circumstances.

5. The Revenue vehemently contended at this stage that the instant issue as to whether the Assessing Officer to take up other issue(s) than those specified in the re-opening is no more *res judicata* as per Section 147, Explanation-3 inserted by the Finance Act (2) 2009 with retrospective effect from 01-04-1989.

6. We have heard rival contentions regarding the instant latter aspect pertaining to the legality of the impugned re-assessment opening. We find no substance in the Revenue's stand as per tribunal's co-ordinate bench's decision in Joginder Singh Vs. ITO, ITA No.222/Asr/2014, dt.11-06-2015:

"2. We consider it appropriate to hear this appeal, under proviso to Rule 11 of the Appellate Tribunal Rules 1963, on the following ground:

When addition made by the Assessing Officer, on the peculiar facts and circumstances of this case and on the basis of reasons recorded for reopening the assessment, are deleted, the CIT(A) ought also to have held, as a corollary to this action and on the peculiar facts of this case, that reassessment itself was unsustainable in law.

3. The parties were accordingly, put to notice though, in the light of the issues raised during the year, this ground was slightly modified during the course hearing.

The registry was also directed to find out whether there is any cross appeal against the impugned order passed by the CIT(A). We are informed that no cross appeal is filed against this order. Learned

*Departmental Representative did not object to our reframing the ground of appeal but submitted, by way of a written note dated 5th June 2014, that "**the learned CITA) could not do so in view of the judgment of Hon'ble Punjab & Haryana High Court in the case of Manjinder Singh Kang Vs CIT reported at 344 ITR 358**". It is in this backdrop that we proceed to dispose of this appeal on the above ground of appeal.*

4. To adjudicate on the above ground of appeal, only a few material facts need to be taken note of. This is a case of reopened assessment. As for the reasons for which the assessment was reopened is evident from the following observations at pages 1-2 of the assessment order:

"An information was gathered by the Department that the assessee alongwih Sh. Narinder Singh, Mrs. Aspinder Kaur, Sh. Jaswinder Singh, Smt. Nirmal Kaur, Sm. Mohinder Kaur, Sh. Surinder Mohan Singh and Sh. Jiwan Singh were running a firm under the name and style of M/s. City Plaza, Jalandhar wherein they were dealing in real estate business. Vide dissolution deed dated 05.03.2003, old firm was dissolved and Sh. Joginder Singh along with Smt. Mohiner Kaur, Sh. Surinder Mohan Singh and Sh. Jiwan Singh Continued the business and took over the firm. As per said dissolution deed, these continuing partners paid the following amounts, through post dated cheques to the outgoing partners :

Cheque No. Dated Amount Drawn on
225073 10.03.2005 23,57,000 PNB Civil Lines
225074 20.03.2005 23,57,000 PNB Civil Lines
225075 31.03.2005 23,57,000 PNB Civil Lines

Further, the continuing partners also settled the loan account with the Citizen Urban Co-operative Bank Limited, Jalandhar wherein repayment of loan of Rs.40,90,630/- and interest of Rs.40,92,568/- was made during the financial year 2004-05. It was seen that the payment made as above was much more than the income declared by the assessee. Therefore, my predecessor after recording the reasons and after obtaining necessary permission from the then Addl. CIT, Range III, Jalandhar reopened the assessment in this case by issue of Notice u/s. 148 of I.T. Act on 29.3.2012, which was served on the assessee on 29.03.2012. In response to this notice, the assessee himself attended before my predecessor on 24.4.2012 and filed a letter along with a copy of the return of his income. It was further stated by the assessee before the then AO that his return already filed on 11.1.2006 may be treated to have been filed in response to notice u/s.148."

5. In the assessment framed as a result of the reassessment proceedings, the Assessing Officer did make additions in respect of the reasons for which assessment was reopened. The matter

travelled in appeal before the CIT(A) and one of the contentions of the assessee was that "on the facts and in the circumstances of the case, the jurisdiction under section 147/148 has been wrongly invoked by the ITO". In the submissions made by the assessee, which have been extensively reproduced by the CIT(A), it was inter alia submitted by the assessee that, "none of the above allegations (i.e. reasons for reopening the reassessment) had any sound basis to reach a satisfaction (that income has escaped assessment) mandated under section 148". These submissions, however, did not find favour with the learned CIT(A) who upheld reopening of the assessment by observing as follows:

"5.4. I have considered the assessment order as well as the written submissions of the assessee on the issue under reference. I have also considered the other material brought on record in the case of the partnership firm M/s. City Plaza, Rainik Bazar, Jalandhar. On the perusal of material brought on record it has been noticed that the Assessing Officer was having plenty of reasons to issue notice u/s. 148 of the Act. During the course of investigations by the ADIT(Inv.), the assessee has not disclosed the facts which are now being disclosed at the time of appellate proceedings.

Moreover, proof of payment made by the buyer has not been filed. The cheques issued by Shri Surinder Mohan Singh to the outgoing partners were found to be drawn on an account which was not in his name or in the name of partnership firm. In these facts and circumstances of the case, I am of the opinion that he Assessing Officer is fully justified in assuming jurisdiction in this case u/s. 147/148 of the Act and making assessment in this case. In the result, the ground of appeal No. 1 taken by the assessee is, therefore, dismissed."

6. Quite interestingly, even as the CIT(A) upheld the reassessment proceedings the very additions made on the basis of the reasons for reopening were quashed. The reasoning adopted by the CIT(A) in cancelling these additions were as follows:

"6.4. I have considered the assessment order as well as the written submissions of the assessee. I have also considered the other material brought on record in the case of partnership firm M/s City Plaza as well as in the case of other partners. During the course of appellate proceedings, it has been submitted by the assessee that the payments made by the partnership firm M/s. City Plaza or by its continuing partners were made out of the sale proceeds of the commercial building known as City Plaza. Not only this, it has further been stated that the payments to the outgoing partners as well as the payment to M/s. Citizen Urban Co-operative Bank towards term loan and interest thereon has been made directly by the purchaser of property known as City Plaza Building i.e. by Sh. Prem Kumar

Bhagat. The necessary evidence with regard to the payment of bank loan and interest thereon has also been brought on record. The payments to the outgoing partners were also found to be made by the purchaser of the property. The details of the payments to outgoing partners are given in the sale deed itself which in fact have been made during F.Y. 2005-06. The post dated cheques were also not en-cashed by the outgoing partners and they received the payment in respect of their share directly from the purchaser of the property i.e. from Shri Prem Kumar Bhagat. These facts and also submissions made by the assessee with regard to the payment to outgoing partners and bank have also not been controverted by the Assessing Officer. In these facts and in the circumstances of the case, I am of the opinion that the payments to outgoing partners as well as in respect of bank loan and interest are satisfactorily explained by the assessee with documentary evidence. I am, therefore, of the opinion that the Assessing Officer is not justified in making the additions which have been challenged vide grounds of appeal No. 2, 3, 4 & 5. The additions of Rs.17,67,750/-, Rs.10,22,657/- and Rs.10,23,142/- are, therefore, directed to be deleted. In the result, grounds of appeal No. 2, 3, 4 & 5 taken by the assessee are allowed."

7. The short question before us really is whether in such circumstances the CIT(A) ought also to have cancelled the reassessment proceedings as well and whether there is any contradiction in the action of the CIT(A) in upholding the reassessment proceedings and quashing the additions made on the basis of the reasons recorded for reopening the assessment. This question assumes significance in the light of the fact that while these additions stand deleted, some other additions, made during the course of reopened assessment, continue to survive.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We have noted that the assessment was reopened on the ground that the partnership firm Citi Plaza, in which the assessee had 25% share, had issued three post dated cheques of Rs 23,57,000 each and made bank payments of Rs.40,90,630 towards principal and Rs 40,92,568 towards interest, whereas the above "payments were much more than the income declared by the assessee". Learned CIT(A) himself holds, in paragraph 6.4 extracted above, that the post dated cheques issued by the partnership firm were not encashed and that the bank payments were not made by the partnership firm but by the buyers of the property sold by the partnership firm. During the appellate proceedings, the Assessing Officer was duly confronted with the related facts and he could not, as the CIT(A) has noted in so many words, controvert the stand of the assessee. Clearly, therefore,

the reasons for reopening the assessment were incorrect. The CIT(A) has held so and the Assessing Officer is not in challenge against these findings. Yet, when it came to adjudicate upon the challenge to the validity of reassessment proceedings, the CIT(A) holds that "the Assessing Officer was having plenty of reasons to issue notice under section 148 of the Act". He does so on the basis that (a) "the assessee had not disclosed the facts which are now being disclosed at the time of appellate proceedings", and that (b) "the cheques issued by Shri Surinder Mohan Singh (i.e. a person other than the assessee) to the outgoing partners were found to be drawn on an account which was not in his name or in the name of the partnership firm". These things were, in our considered view, wholly irrelevant inasmuch as these things have nothing to do with the reasons of reopening the assessment as noted in the reassessment order itself.

10. In any event, it was not the revenue's case that the assessee failed to disclose what he ought to have disclosed under the law. Such a non disclosure, therefore, cannot be a reason enough to uphold the validity of reassessment proceedings. Similarly, the cheques to the outgoing partner of the firm, in which assessee is a partner, having been issued by an account other than the account of the assessee or of the partnership firm cannot be a reason enough to come to the conclusion that 'income has escaped assessment in the hands of the assessee'. There is no cause and effect relationship in this fact and the income escaping assessment in the hands of the assessee.

11. It is a well settled legal position, as held by Hon'ble Bombay High Court, in the case of ***Hindustan Lever Ltd. vs. R.B. Wadkar [(2004) 268 ITR 332 (Bom)],*** *that when it comes to examining the validity of reassessment proceedings, "****.... No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him****". Hon'ble Bombay High Court, in the case of* ***Prashant S. Joshi vs. ITO [(2010) 324 ITR 154 (Bom)]*** *has observed : "****The AO must have reasons to believe that such is the case*** *(i.e. any income chargeable to tax has escaped assessment for a particular year)* ***before he proceeds to issue notice under s.147****" and that "****the reasons which are recorded by the AO are the only reasons which can be considered when formation of belief is impugned****". In view of these discussions, and the correctness of the reasons recorded for reopening the assessment having been decided against this assessee, the CIT(A) ought also have held that the very reassessment proceedings are legally unsustainable on the facts of this case. There is an inherent contradiction in the approach of the CIT(A).*

12. Learned Departmental Representative's defence for the stand of the CIT(A)'s order is reliance on Hon'ble jurisdictional High Court's judgment in the case of ***Majinder Singh Kang*** *(supra). That was a case in which Their Lordships have held that even when the Assessing Officer does not make any addition in respect of the reasons for which reassessment proceedings are initiated, the reassessment proceedings can still be valid nevertheless. To quote the observations made by Their Lordships, "****A plain reading of Explanation 3 to Section 147 clearly depicts that the assessing officer has power to make additions even on the ground on which re-assessment notice might not have been issued in case during reassessment proceedings, he arrives at a conclusion that some other income has escaped assessment which comes to his notice during the course of proceedings for re-assessment under Section 148 of the Act*** *" and that "****The provision nowhere postulates or contemplates that it is only when there is some addition on the ground on which re-assessment had been initiated, that the assessing officer can make additions on any other ground on the basis of which income may have escaped assessment.***" *The SLP filed by the assessee, against the view so expressed by Their Lordships, has been dismissed by Hon'ble Supreme Court on 19.08.2011.*

13. The view so taken by Their Lordships is the law in the jurisdiction of Hon'ble Punjab & Haryana High Court even though other Hon'ble High Courts have taken a contrary view. The judicial precedents from other Hon'ble High Courts, as available in the public domain and even after taking note of the views so expressed by Their Lordships, have taken a contrary view of the matter, such as in the cases of ***CIT vs Mohmed Juned Dadani [(2013) 258 CTR 268 (Gujrat)], CIT VS Jet Airways [(2011) 331 ITR 236 (Bombay)], Ranbaxy Laboratories Limited Vs CIT [(2011)336 ITR 136 (Delhi)], ACIT Vs Major Deepak Mehta [(2012) 344 ITR 641 (Chattisgarh)].*** *All these decisions were dealing with the law as it stood after the insertion of Explanation 3 to Section 147 but then the views so expressed being contrary to the law laid down by Hon'ble jurisdictional High Courts, these decisions cannot indeed be applied on this assessee. Be that as it may, that is a purely academic aspect of the matter.*

14. There cannot possibly be any two opinions with regard to the enunciation of law by Their Lordships in Majinder Singh Kang's case (supra). However, we find that the reliance by the learned Departmental Representative on this decision, on the facts of this case, to be inapt. In Majinder Singh Kang's case, Their Lordships have nowhere held that the proposition of law laid down therein to be applicable even to the cases wherein even when reasons recorded for reopening the assessment are held to be incorrect, and thus

unsustainable in law, the Assessing Officer can still go ahead and make additions in the reassessment proceedings in respect of reasons other than the reasons recorded for reopening the reassessment. Hon'be High Court's judgment in the case of Majinder Singh Kang's case (supra) has not been shown to have altered, even sub silientio, the well settled legal position that the validity of reassessment proceedings is a sine qua non for any additions being made to the income of the assessee, during the course of the reassessment proceedings whether in respect of the reasons recorded for reopening the assessment or in respect of the reasons other than the reasons recorded for reopening the assessment.

15. Moreover, particularly in the light of the scheme of law as visualized by Hon'ble Supreme Court's decision in the case of ***GKN Driveshafts Vs ITO [(2003) 259 ITR 101 (SC)]****, such a situation would be rather rare.*

16. The reason is this. The reasons for reopening the assessment, as is the scheme of law visualized and set out by Hon'ble Supreme Court in the GKN Driveshaft's case (supra), are to be confronted to the assessee and the assessee has an opportunity to rebut these reasons. This is a stage prior to the Assessing Officer proceeding with the reassessment proceedings and after he has issued notice for reopening the assessment. In a situation in which the assessee can convince the Assessing Officer that these reasons are not good enough to make the additions, the reassessment proceedings are to be dropped anyway.

17. There is no bar on the nature of material that the assessee may seek to rely upon, even at the first stage, to demonstrate that the reasons for reopening are unsustainable in law and even this adjudication by the Assessing Officer is subject matter of legal scrutiny by the appellate authorities in the course of the same appellate proceedings as against the reassessment order. The scheme of law, as laid down by the Hon'ble Supreme Court in GKN Driveshaft's case, thus provides for dual adjudication by the Assessing Officer on the correctness of the reasons recorded for reopening the assessment- one at the stage of dealing with the objections of the assessee prior to proceeding with the reassessment proceedings, and the other at the point of time when, during the reassessment proceedings, the Assessing Officer has to take a call on additions to be made in respect of these reasons. That is where there is a paradigm shift in the scheme of things post GKN Drivershaft decision. In a situation in which, during the reassessment proceedings, the Assessing Officer finds these reasons to be so incorrect that he concludes that no income has escaped the assessment and the additions on that count are unwarranted, the same should have been the position at the stage of adjudicating on

the correctness of the reasons recorded in the pre-reassessment proceedings. In the latter proceedings also, the assessee has the liberty to bring the material, other than that available to the Assessing Officer on his records, that no income has escaped assessment. The conclusions in these two sets of somewhat parallel exercises cannot, therefore, be ordinarily different. In other words, when the Assessing Officer is satisfied that no additions can be made on the basis of the reasons of reopening, as recorded by him, he has to drop the reassessment proceeding at this initial stage itself. When the examination of correctness of the reasons recorded come up for adjudication before the appellate authorities, the approach, therefore, cannot be any different either.

18. In the case before Hon'ble jurisdictional High Court, as evident from the extracts from the CIT(A)'s order reproduced therein, the reassessment was quashed on the ground that the Assessing Officer "could not make additions in respect of the income which had not escaped assessment for which no notice had been given to the assessee under Section 148 read with Section 147 of the Act". Their Lordships appreciated that to that extent the legal proposition was incorrect in the light of insertion of Explanation 3 to Section 147, and the earlier judicial precedents, which were relied upon by the assessee, did not hold good law, as Their Lordships made clear in no uncertain words. The correctness of the reasons of reopening was not an issue before Their Lordships. The correctness of the reasons for reopening was not, directly or indirectly, in challenge.

19. As is evident from the discussions earlier in this order, here is a case in which the very reasons on account of which the CIT(A) has deleted the quantum additions were also good enough to hold that the initiation of reassessment proceedings is bad in law and yet the CIT(A) was fighting shy of the logical conclusions thereto and natural corollaries to these findings. It is also important to bear in mind the fact that the relief so granted by the CIT(A), on the basis of which the additions in respect of the reasons recorded for reopening the assessment were deleted and which were, in our considered view, good enough to quash the reassessment itself, is not even challenged in further appeal. These findings of the CIT(A) have thus reached finality. and are not even in dispute before us. If such be the facts, there can be no justification for taking these findings to its logical conclusions and, based on these uncontroverted findings, quash the reassessment itself. What held good for deleting the additions on the basis of the reasons recorded the assessment, on the fact of this case and in our humble understanding, was good enough to hold the reasons for reopening the assessment to be incorrect as well. We are unable to see any legally sustainable reasons to come to different conclusions. In our considered view, therefore, the CIT(A) ought to have quashed the reassessment as well.

20. In view of these discussions, and bearing in mind entirety of the case, we hold that the CIT(A) ought to have, on the peculiar facts and circumstances of the case, quashed the reassessment proceedings as well. We, therefore, quash the reassessment proceedings. As reassessment itself is quashed as above, nothing else survives for adjudication".

7. We adopt the foregoing detailed reasoning *mutatis-mutandis* to accept assessee's former substantive grievance challenging validity of the impugned re-opening. The same stands quashed.

All other pleadings on merits are rendered infructuous.

8. We lastly acknowledge that although the instant lis is being decided after a period of 90 days from the date of hearing as per Rule 34(5) of the IT(AT) Rules 1963, the same however, does not apply in the covid lockdown situation as per hon'ble apex court's recent directions dated 27-04-2021 in M.A.No.665/2021 in SM(W)C No.3/2020 *'In Re Cognizance for extension of limitation'* making it clear that in such cases where the limitation period (including that prescribed for institution as well as termination) shall stand excluded from 14th of March, 2021 till further orders.

9. This assessee's appeal is allowed in above terms.

Order pronounced in the open court on 2nd July, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 02-07-2021

TNMM

Copy to :

1.M/s.GEL Infrastructure Private Limited, C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad.

2.The Income Tax Officer, Ward-2(2), Hyderabad.

3.CIT(Appeals)-1, Guntur.

4.Pr.CIT-II, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.