



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF JUNE 2015

PRESENT

THE HON'BLE MR. JUSTICE VINEET SARAN

AND

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

ITA NO.228/2009

BETWEEN

SMT. SAIRA BANU
N-42, 9TH 'B' MAIN
LIC QUARTERS
JEEVANBHIMANAGAR
BANGALORE-560 075.

...APPELLANT

(BY SRI A.SHANKAR AND SRI M.LAVA, ADVs.,)

AND

THE ASSISTANT COMMISSIONER
OF INCOME TAX
CIRCLE-7(1)
KENDRIYA SADAN
KORAMANGALA
BANGALORE-560 034.

...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.,)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX
ACT 1961, ARISING OUT OF ORDER DATED: 27.02.2009 PASSED IN
ITA NO.957/BNG/2008, FOR THE ASSESSMENT YEAR 2004-05,
PRAYING TO:

- I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN,
- II. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA NO.957/BNG/2008, DATED 27.02.2009.

THIS ITA COMING ON FOR HEARING THIS DAY, *VINEET SARAN J.* DELIVERED THE FOLLOWING:

JUDGMENT

The main question involved in this appeal is whether the amount paid in cash by the appellant for purchase of property, would, in the facts of this case, attract the provisions of Section 40A(3) of the Income Tax Act, 1961 (for short 'the Act') or not?

2. For the Assessment Year 2004-05 the appellant had filed return of income declaring a total income of ₹31,65,530/-. The same was accepted after being processed under Section 143(1) of the Act and refund of ₹6,693/- was ordered. The case was subsequently selected for scrutiny and by an order passed under Section 143(3) of the Act, the income of the appellant was determined at ₹59,75,530/- and a tax of ₹19,37,824/- along with interest was imposed. Challenging the said order, an appeal was filed, which was dismissed by the Commissioner of Income

Tax (Appeal) (for short 'CIT'), Bangalore, vide order dated 15.04.2008. Aggrieved by the said order of the CIT, the assessee-appellant challenged the same before the ITAT (for short 'Tribunal'), Bangalore, which was also dismissed on 27.02.2009. Aggrieved by the same, this appeal has been filed and appeal came to be ADMITTED on the following questions of law:

“i. Whether on the facts and in the circumstances of the case is the Tribunal justified in holding that the amounts paid towards the acquisition of capital asset and later converted into stock-in-trade would attract the provisions of Section 40A(3) of the Income-tax Act, 1961?

ii. Whether on the facts and in the circumstances of the case is the Tribunal justified in law in holding that despite the payments having been made for the purchase of the capital asset yet it retained the character of business expenditure the moment the capital asset was converted to stock-in-trade to warrant applicability of Section 40A(3)?

iii. Whether the Tribunal was justified in law in holding that disallowance has to be made

under Section 40A(3) after upholding the genuineness of the payments on the facts and circumstances of the case?”

2. We have heard Sri A.Shankar, learned counsel for the appellant and Sri K.V.Aravind, learned counsel for the respondent at length and have perused the records.

3. The question is of applicability of Section 40A(3) of the Act with regard to three transactions relating to purchase of three different properties from different persons. In the financial year in question, the appellant had purchased 12 properties, out of which payment for nine was made by cheques/bank drafts. Hence, there is no dispute regarding the same. For the remaining three properties, major portion of the payment was made by cash. Since in the declaration made by the appellant before the assessing officer it was stated that she was carrying on the business as dealer in Superior Kerosene Oil as well as sale and development of land, the Assessing Officer found that purchase of three plots of land, for which payment had been made in cash, was for business

purpose and as such Section 40A(3) of the Act was attracted as the payments in cash were of over ₹20,000/- and as such disallowed 20% and brought it to taxable income of assessee which was also affirmed by both the appellate authorities.

The submission of Sri A.Shankar, learned counsel appearing of the appellant is of two fold. Firstly, it is contended that the land was purchased as capital asset and hence the provisions of Section 40A(3) of the Act would not be attracted even though during the year in question itself the land so purchased had been converted from capital asset to stock-in-trade. It was next submitted that even if the purchase of land was treated as business transaction then too, under the second proviso of Section 40A(3) of the Act, the same would be exempted as payments made in cash was on account of business exigency and identity of the seller was duly certified and it was acknowledged by the sellers that they had received payments in cash and their respective PAN numbers had also been provided and as such assessing officer could not have disallowed 20% of

sale consideration by invoking Section 40A(3) of the Act. In support of his contention, learned counsel for the appellant has relied on the following decisions:

- i. Tolaram Daga -vs- Commissioner of Income Tax, Assam*
([1965] 57 ITR (Sh.N.) 9) / [1966] Vol.LIX ITR 632
- ii. Attar Singh Gurmukh Singh -vs- Income Tax Officer, Ludhiana*
[1991] 191 ITR 667
- iii. Sri Laxmi Satyanarayana Oil Mill -vs- Commissioner of Income Tax*
[2014] 367 ITR 200 (T & AP)
- iv. Smt. Harshila Chordia -vs- Income-Tax Officer*
[2008] 298 ITR 349 (Raj)
- v. Shri Shankar S. Koliwad -vs - The Income Tax Officer*
ITA NO.5040/2009 (Dharwad Bench)
- vi. Patil Vijaykumar and others -vs- Union of India & another*
[1985] 151 ITR 48 (Karn)
- vii. Walford Transport (Eastern India) Ltd. -vs- Commissioner of Income Tax*
[1999] 240 ITR 902
- viii. Assistant Commissioner of Income Tax -vs- Sri Saraswathi Iron Foundry*
[2006] 287 ITR 313 (Karn)

It has been vehemently contended on behalf of the appellant that the purpose of Section 40A(3) of the Act is not to penalize the assessee for making cash payment but it is only

preventive and to check evasion of tax and flow of unaccounted money or to check transactions which are not genuine and since, in the facts of the present case, the genuineness of the transaction is not disputed and the sellers are identified and have acknowledged having received the payments in cash, the provisions of Section 40A(3) of the Act would not be attracted.

Learned counsel for the appellant has further contended that though appellant had disclosed the fact that the purchase of plots in question was for capital asset and during the course of the year it was converted as stock-in-trade, which was reflected in the books of account of the appellant, the denial of the benefit by the assessing officer was wholly unreasonable and illegal as even after accepting the books of accounts where purchase has been shown as capital asset, the property has been treated as stock-in-trade. According to the appellant what is to be considered is that for what purpose i.e. as a capital asset or for business purpose, the property was being purchased and once the assessee establishes that at the time of purchase it was a capital asset, merely because

subsequently it was converted as stock-in-trade the same would not mean that it was a business transaction and the provisions of Section 40A(3) of the Act would not be attracted. It has been contended by learned counsel for the appellant that in case the assessing officer was not to accept the contention of the appellant, then opportunity ought to have been given to the appellant to explain the same before framing the assessment order.

As regards the order of the CIT passed in appeal, learned counsel submits that the assessee had produced the relevant documents to identify the sellers as well as their PAN numbers and also certificate of the sellers to the effect that the payments have been received by them in cash, and once the same has been done, if the Commissioner was not satisfied, he ought to have given opportunity to the appellant to produce further evidence in support of her case, which was not done. It has been submitted that even before the Tribunal no opportunity was given and the finding recorded by the authorities below are against the record as

the books of accounts clearly reflect the purchase of property as capital asset and at no stage opportunity was given to the appellant to produce any evidence as no notice was given prior to rejecting the contention of the appellant.

3. On the other hand, Sri K.V.Aravind, learned counsel appearing for the revenue has submitted that the appellant has not demonstrated any business exigency because of which payment had to be made in cash and according to him other relevant factors could be considered only after the assessee would demonstrate that business exigency required payment to be made by cash and not by cheque. He also contended that the purpose for which the land was purchased was for business as the appellant had herself disclosed that she was in the business of sale and development of land. Learned counsel submitted that in the return filed by the assessee, the purchase of all three plots was shown as stock-in trade and then showing it as a capital asset at the time of purchase and thereafter converting into stock-in-trade was done in the books of account as an after thought.

4. Having heard learned counsel for the parties and considering the facts and circumstances of the case, we are of the opinion that if the authorities below were to treat the transaction of purchase of land as a stock-in-trade (business purpose) and not as a capital asset, then they ought to have given sufficient opportunity to the assessee to prove her stand because this has not been done even though the genuineness of the transaction has not been disputed by the authorities and even the books of account of the assessee came to be accepted. In our view, the department has also not provided sufficient opportunity to the assessee with regard to her establishing that business exigency required payment in cash, in as much as the department if it was not satisfied by the explanation given by the assessee, ought to have issued a show cause notice to her to explain the same.

5. In view of the aforesaid fact situation, we are of the opinion that on account of petitioner not having been afforded adequate opportunity to show cause before a final decision was taken, the matter requires to be remanded back to the assessing

officer for deciding the case afresh in accordance with law and after giving an opportunity to the appellant-assessee. Since we are remanding the matter back to the assessing officer, we are not answering the questions which have been framed in this appeal and leave it open to the authorities to decide the matter in accordance with law. It is made clear that all contentions of both parties are left open to be raised before the assessing officer.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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