Anala Anjibabu ITA No. 415/Viz/2019 (Cross Objection No. 10/Viz/2020) Vishakapatnam ITAT

Issues discussed and addressed:

Taxability Under Section 56(2)(vii)(b)

Facts of the Case:

During the assessment proceedings, the AO found that the assessee has purchased the immovable property bearing D.No.9-137/3, Srivalli Nagar, Madhurawada, Visakhapatnam from Smt. Simhadri Sunitha and the transaction was registered vide document No.4539/2013 on 28.10.2013 at SRO, Madhurawada for a consideration of Rs.5 crores, whereas the Govt. value of the said property for registration purpose was fixed at Rs.12,67,82,500/-. The AO invoked provisions of section 56(2)(vii)(b) of the Act and taxed the difference between the consideration paid and the SRO value as on the date of agreement amounting to Rs.4,55,11,750/- and completed the assessment.

Held by the Authorities:

The provisions of section 56(2)(vii)(b)(ii) came into statute by Finance Act 2013 w.e.f. 01.04.2014 i.e., A.Y.2014-15. In the instant case, the assessee had entered into agreement for purchase of the property on 13.08.2012 for a consideration of Rs.5.00 crores and paid the part of sale consideration by cheque. This fact is evidenced from the assessment order. In the assessment order, the AO acknowledged the fact that the assessee had entered into an agreement for purchase of the property for a sum of Rs.5 crores and paid the advance of Rs.5 crores on 13.08.2012. There is no dispute with regard to existence of agreement. From the order of the Ld.CIT(A), it is observed that the property was in dispute due to bank loan and the original title deeds were not available for complying with the sale formalities. Therefore, there was a delay in obtaining the title deeds for completing the registration. Thus, we find that there is genuine cause for delay in getting the property registered.

The Ld.CIT(A) relied on the decision of M.Siva Parvathi and Ors, which is rendered in the context of application of section 50C of the Act. In the decision cited, this Tribunal has considered the decision of Hon'ble Supreme Court in the case of K.P.Varghese and held that the provisions of section 50C which were not available in the statute cannot be applied during the interim period.

Hon'ble Supreme Court in the case of K.P.Vargheese observed that the vendor has fulfilled the contractual obligation which was cast up on him by sale agreement. It was held by the Hon'ble Apex court in Nirmal Textiles that the character of the transaction vis-à-vis I.T. Act to be decided on the basis of the law that is prevalent as on the date of transaction which was initially entered into. Final transaction was only the

fulfilment of the contractual obligation, thus, this Tribunal viewed that the proviso which was not in existence at the time of entering into the transaction would not apply at the time of completion of the transaction also. As observed from the facts, in this case, agreement was entered on 13.08.2012 for purchase of the property and paid part consideration as discussed above. Hence, the provisions existing as on the date of entering into agreement required to be applied for deciding the taxable income.

Abdul Hamid ITA Nos. 46/Gau/2019, 47/Gau/2019 Gauhati ITAT

Issues discussed and addressed:

Applicability of Section 115 BBE vis a vis 263

Facts of the Case:

The assessee was engaged in supply of eggs and also received salary and interest on capital from partnership firm M/s Niher Enterprises. The assessment, in the assessee's case, was completed by the Assessing Officer under section 143(3) of the Income-Tax Act, 1961 on 30-12-2016 with addition of Rs. 3,65,933/-, in the total income of the assessee as undisclosed income after taking margin of profit @ 4% on the undisclosed turnover of Rs. 91,48 326/-, (that is, 4% of Rs. 91,48 326/- which comes to Rs. 3,65,933/-).

Later on, Learned Principal Commissioner of Income Tax (PCIT) has exercised his jurisdiction under section 263 of the Act. The ld PCIT was of the view that a very low rate of net profit was considered by assessing officer on undisclosed business turnover of the assessee and the undisclosed income of Rs. 3,65,933/- (that is, 4% of Rs. 91,48 326/- which comes to Rs. 3,65,933/-), so added by the AO to the total income of the assessee, should have been treated and taxed as per provisions of section 115BBE of the Income-tax Act, 1961.

Held by the Authorities with respect to Issue No 1:

Validity of Revision u/s 263

It is clear from various judicial precedents that when the order of the Assessing Officer is not erroneous, section 263 cannot be invoked to direct the Assessing Officer to hold another investigation [Infosys Technology Ltd. vs. JCIT 286 ITR (AT) 211 (Bang)] The law with regard to exercise of jurisdiction u/s.263 of the Act on the ground that the AO failed to make enquiries which he ought to have made in the given circumstances of a case is well settled. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The Income-tax Officer is not only an

adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. We derive support for the proposition as stated above from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

Since in the present case, the ld PCIT has exercised jurisdiction u/s.263 of the Act on the ground that the AO while completing the assessment proceeding did not make enquiries which he ought to have made.

We note that Assessing Officer has duly assessed the deposits in the bank account No.2195697434 of Central Bank of India, to the tune of Rs.95,33,717/-, treating Rs. 91,48,326/- as undisclosed business receipts/undisclosed turnover. Thereafter the assessing officer computed the margin of profit @4% of undisclosed business receipts at Rs. 3,65,933/- (that is 4%Rs.95,33,717). The AO also made addition on account of interest on saving bank account at Rs.11,521/-.Therefore, the bank account A/c No. 2195697434 has been verified by the assessing officer and on being confronted, during the assessment proceedings, the assessee made submission on 27/12/2016 before the assessing officer stating that out of aggregate deposits of Rs. 95,33,717/- made in the said bank account A/c No. 2195697434, Rs.91,48,326/-was his business receipts, and Rs.3,73,870/- was maturity proceeds of daily deposit accounts and Rs 11,521/- was interest income on savings account. The assessee also informed to the assessing officer that after his father's death, the assessee had started doing business and using the above said bank account in question, which was not reflected in his Return of income.

Therefore, one of the grounds on which the ld PCIT had exercised jurisdiction (that the net profit of Rs.3,65,933/- considered by the Assessing officer on the undisclosed business turnover of Rs.91,48,326/-was without any verification and proper analysis which needs to be examined properly), has been examined by the assessing officer properly. Therefore, when the order of the Assessing Officer is not erroneous, section 263 cannot be invoked to direct the Assessing Officer to hold another investigation.

Judgments Relied upon by the Authorities:

Infosys Technology Ltd. vs. JCIT 286 ITR (AT) 211 (Bang)

Held by the Authorities with respect to Issue No 2:

Applicability of Section 115 BBE to Business Income

We are of the view that business activity related income may not ordinarily get placed u/s 68 to section 69D of the Act. In the assesseevs case under consideration, the assessee submitted before the assessing officer that deposits of Rs.91,48,326/- in bank account No. 21956697434, were business receipts. We note that assessing officer in his assessment order has also treated the undisclosed amount in bank account as undisclosed business receipts/turnover. Since, the assessing officer has applied his mind and treated the undisclosed amount in bank account as undisclosed business receipt or turnover of the assessee, therefore provisions of section 115BBE does not apply to the assessee.

Sayqul Islam IT Appeal No.235 (GAU.) of 2019 Gauhati ITAT

Issues discussed and addressed:

Addition u/s 44AD

Facts of the Case with respect to Issue No 1:

On examination of the return of income and the other documents submitted by assessee, it was noticed by assessing officer that the assessee has declared net profit to the tune of Rs. 2,21,539/- on his turnover shown at Rs. 2,23,59,967/-. On percentage terms, the net profit comes to 0.99% of the turnover shown at Rs. 2,23,59,967/-. The information was provided by the assessee in his return of income reflecting maintenance of books of accounts, but not audited as required under the provisions of Section 44AB of the Act.

As assessing officer noticed that the assessee shown turnover at Rs. 2,23,59,967/- and net profit at Rs. 2,21,539/- and in terms of percentage the net profit ratio comes @ 0.99%, which is less than 8% as required by the provisions of section 44AD of the Act. Therefore, the assessing officer was of the view that as per provisions of section 44ADof the Act, an assessee may claim lower profits and gains than the profits and gains specified in sub-section (1) of section 44AD of the Act, provided the assessee keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA of the Act and gets his accounts audited and furnishes a report of such audit as required u/s 44AB of the Act. Since, the turnover of the assessee was more than the prescribed limit for audit of one crore but not audited and assessee estimated the net profit lower than 8%,

Held by the Authorities with respect to Issue No 1:

From the comparative details of subsequent years, we note that the average profit rate for subsequent assessment years 2016-17, 2017-18 and 2018-19 comes at 3.09% (2.64 +2.65+4.00/3). Normally, to estimate the profit of any assessee, the previous years` profit ratios are used and not the subsequent years` profit ratio. However, the subsequent years` profit ratios as submitted by the assessee provide us a bird eye and rough idea that what is the earning trend in the assessee`s business.

It is also admitted fact that assessee`s books of accounts were not rejected by the assessing officer although these were not audited under section 44AB of the Act by a Chartered Accountant. We note that the AO could have ventured into estimation only after rejecting the books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, the AO has not passed any order u/s 144 of the Act. The AO thus without rejecting the books of account of the assessee has gone for estimation on suspicion and conjectures that the assessee may be inflating its expenses and showing net profit ratio at a very low rate. Therefore, based on the factual position narrated above we find merits in the contention of the Counsel. Therefore, taking into account merits of the assessee`s case, as narrated above, in our opinion the ends of justice would be met, if a net profit rate of 2.50% is adopted.

Laxmi Ventures (India) Ltd. ITA Nos. 1631, 1731, 2674/Mum/2016 Mumbai ITAT

Issues discussed and addressed:

Issue No 1 Disallowance u/s 14A Issue No 2 Disallowance of Foreign Travel Expense

Facts of the Case with respect to Issue No 1:

The assessee had earned exempt income of Rs. 1,575 and had voluntarily disallowed a sum of Rs. 1,40,392 under section 14A of the Act in the return of income. The learned Commissioner (Appeals) observed that no working for the same was given for arriving at the said disallowance by the assessee. The learned assessing officer applied computation mechanism provided in Rule 8D(2) of the rules and made disallowance of Rs. 3,53,062 over and above the voluntary disallowance of Rs. 1,40,392 made by the assessee. This action of the learned assessing officer was upheld by learned Commissioner (Appeals).

Held by the Authorities with respect to Issue No 1:

We find that the law is now very well settled that the disallowance under section 14A of the Act should be restricted only to the extent of exempt income and direct the learned assessing officer to restrict the disallowance only to the extent of Rs. 1,575 being the exempt income.

Judgments Relied upon by the Authorities:

Joint Investment Pvt. Ltd (2015) 372 ITR 694 (Del)

Facts of the Case with respect to Issue No 2:

The learned assessing officer observed that the assessee had debited a sum of Rs. 6,94,068 on account of foreign travelling expenses of Shri Amit Agarwal for Europe visit and a sum of Rs. 1,70,511 on account of foreign travel of Shri Sandeep Agarwal and Mrs. Chitra Agarwal for travelling to London. The assessee was asked to justify the business nexus of these foreign trips for the purpose of allowability by the learned assessing officer. The assessee submitted the ledger account alongwith copy of invoices issued by the travel agent. The learned assessing officer observed that all the three persons travelled to the same location i.e. Bombay to London during Europe visit. The learned assessing officer observed that assessee could not produce any other evidences to substantiate the business nexus by proving the purpose of visit by its Directors to these foreign countries and benefits derived by the assessee company thereon pursuant to such visits. Accordingly, he disallowed a sum of Rs. 8,64,579 towards foreign travel expenses as not meant for the purpose of business of the assessee in the assessment.

Held by the Authorities with respect to Issue No 2:

We find that the learned Commissioner (Appeals) after verifying the Board resolution and appreciating the fact that turnover has substantially increased during the year under consideration pursuant to the said foreign visits observed that assessee had duly established the business nexus thereon and accordingly, deleted the disallowance made by the learned assessing officer. It is not in dispute that Soya DOC Hypro was a new variety of DE oiled cake developed specially for the European market by the assessee and the same has been launched for the first time during the F.Y.2009-10. Hence, this product required to be promoted in the European market for which the Directors of the assessee company had visited the relevant foreign country. This goes to prove that the benefits derived by the assessee pursuant to such foreign receipts by its Directors stands established by the business nexus. Hence, we do not find any infirmity in the action of the learned Commissioner (Appeals) granting relief to the assessee.

Abhishek Acharya I.T.A. No. 5960/M/2018 Mumbai ITAT

Issues discussed and addressed:

Non Service of Notice u/s 143(2)

Facts of the Case:

The facts in brief are that the notice under section 143(2) of the Act was issued and sent on the address 710, Everest, J.P. Road, Andheri (West), Mumbai on 29-10-2003. However, the said notice was returned unserved. The assessee, in the return of income filed, has stated the address as E-202, Serenity of New Link Road, Oshiwara, Andheri (West), Mumbai 400 053 and thus the notice has been sent on the wrong address. Thereafter, no attempt was made by the assessing officer to send the notice on the correct address and finally the assessment under section 143(3) of the Act was framed vide Order, dated 31-3-2005.

Held by the Authorities:

The undisputed facts are that the notice under section 143(2) was not served on the assessee as is apparent from the reply of the assessing officer in response to the RTI application dated 5-10-2018, we observe from the perusal of the said application that the notice has not been served on the assessee. In our opinion, the non service of notice is factual and serous defects in the framing of the assessment and renders the assessment proceedings as well as the consequent assessment order as null and void.

Judgments Relied upon by the Authorities:

1. ACIT v Geno Pharmaceuticals Ltd. (2013) 32 Taxmann.com 162 (Bombay High Court)
2. CIT v Abacus Distribution Systems (India) (P.) Ltd. (2017) 78 Taxmann.com 321 (Bombay High Court)
3. Harjeet Surajprakash Girotra v Union of India & Ors. [Writ Petition No. 513 of 2019] (Bom-HC)
4. Shri Prakash Ramji Gavali v ITO (Mumbai Tribunal) [ITA No. 1492/Mum/2012]
5. Suresh Kumar Sheetlani v ITO (2018) 96 Taxmann.com 401 (Allahabad High Court) (All-HC)
6. Veena Devi Karnani v ITO (2019) 102 Taxmann.com 470 (Delhi High Court)
7. ACIT v Hotel Blue Moon (2010) 188 Taxman 113 (SC)
8. Shri Ramesh Salecha HUF v ITO (Mumbai Tribunal) [ITA No. 3312/Mum/2015]
9. CIT v. Laxman Das Khandelwal (2019) 108 taxmann.com 183 (SC)

Kind Attention:

Before parting we would like to make mention of the recent judgment of the Hon'ble Apex Court PCIT v. M/s. I-Ven Interactive Ltd. Civil Appeal No. 8132 of 2019 (arising out of SLP (C) No. 3530/2019 Order, dated

18-10-2019 : 2019 TaxPub(DT) 7063 (SC), wherein it was held that where mere mentioning the new address in the return of income without specifically intimating the assessing officer qua change of address and without getting the PAN database changed, is not enough and sufficient. the Hon'ble Apex Court has held that in absence of any specific intimation to the assessing officer qua change of address or change of name of the assessee, the assessing officer is justified in sending the notice under section 143(2) at the available address mentioned in the PAN Database of the assessee, especially when the return has been filed under E-module scheme. The said decision was rendered in the context of matter that selection of the case generated under automated system of the department which picks up address of the assessee from the database of the PAN and the change of address in the PAN database is therefore must. The said decision of the Hon'ble Apex court is not applicable to the present facts, as in the instant case there was no PAN Data base and there was no e-filing at that time and scrutiny used to be fixed manually and not on automated system and thus the notice under section 143(2) used to be issued on the basis of the records before the assessing officer.

Kirloskar Oil Engines Ltd ITA Nos. 61 & 406/PUN/2015, 79/PUN/2015 Pune ITAT

Issues discussed and addressed:

Disallowance of Commission under section 40A(2)

Facts of the Case with respect to Issue No 1:

The Commissioner (Appeals) has disallowed commission Rs. 1,80,00,000 paid to Shri Atul Kirloskar on the ground that he was appointed Director on the last date of the financial year ending on 31-032010 and there is no plausible explanation for paying such huge commission to the Directors appointed on the last date of financial year.

Held by the Authorities with respect to Issue No 1:

We observe that the authorities below have not examined the issue in proper perspective. For making disallowance under section 40A(2) the onus is on the revenue to show that payments made by assessee to persons referred in clause (b) are excessive or unreasonable with regard to fair market value of the goods or services received by the assessee. In the present case the authorities below have failed to examine terms and conditions of appointment of Shri Atul Kirloskar. If the terms of appointment allow payment of such commission at the time of appointment, the commission paid to Shri Atul Kirloskar is allowable, provided the commission paid is within the limits specified under Companies Act. We are of considered view that this issue needs revisit to the file of assessing officer for reexamination in the light of our above observations.

A.R. Prasad ITA Nos. 956, 957/Bang/2016 Bangalore ITAT

Issues discussed and addressed:

Transfer – Joint Development Agreement

Facts of the Case:

These two assesses alongwith other co-owners entered into an agreement dated 10-9-2008 with M/s. Vaishnavi Infrastructures, Bangalore for development of residential apartments in their land measuring 4 Acres 26 Guntas and each of these two assesses who are husband and wife had share in the property of 10% each. This is also noted by the assessing officer that share of each of these two assesses was determined at 21 Flats, 29800 sq. feet and the assessing officer also noted that each of these two assesses had transferred 70% of undivided interest in the said property for a consideration of 30% of developed area.

The assessing officer followed the judgment of Hon'ble Karnataka High Court rendered in the case of *CIT v. Dr. T. K. Dayalu* and held that capital gain is taxable in the present year. He computed the capital Gain by applying Guidance Value on the date of JDA @ Rs. 1320 per square feet of the built-up area of flats and Rs. 70,000 for each Car Parking Space to be received by these two assesses and in this manner, the assessing officer brought to tax an amount of Rs. 203,53,228 in each case after allowing deduction of Rs. 49,772 as Indexed cost of acquisition.

Held by the Authorities:

We find that the possession is handed over to the builder only for limited purpose to enter upon the property for the purpose of implementation of JDA. In the present case, such permission to enter the scheduled property is granted subject to completion of certain conditions, i.e., on approval of the plan and grant of licence for construction of the buildings from BBMP and/or from concerned authorities. As per commencement certificate dated 24-8-2009 issued by BBMP permission was granted by BBMP for commencement of building construction work on 24-8-2009. Hence, even as per this permission granted by the land owners in the present case to the builders to enter upon the property for the purpose of implementation of JDA, the builder cannot enter upon the property prior to 24-8-2009 and hence, in the present year up to 31-3-2009, the builder cannot enter upon the property. The tribunal in the above cited case held that the possession granted is in the nature of permissive possession and not possession in part performance of agreement for sale. In the present case, even this permissive possession is not given to the builder prior to 24-8-2009. Hence, we hold that in the facts of the present case as discussed above, even permissive possession was not handed over to the builder in the present year and therefore, in the present

case, we come to the conclusion that since, we have held that there is no transfer in the present year, the remaining grounds no. 5 & 6 do not call for any adjudication.

Judgments Relied upon by the Authorities:

Smt. Lakshmi Swarupa v. ITO (2019) 174 ITD 54 (Bang ITAT)

Relevant Clause in the Agreement:

Sample 1

"1. PERMISSION FOR DEVELOPMENT:

1.1. The First Party agrees to grant permission to the Second Party to enter the Schedule Property on completion of the items mentioned below for the purpose of implementation of this Agreement:

(i) On approval of the plan and grant of licence for construction of the buildings as aforesaid in the Schedule Property from Bruhat Bangalore Mahanagara Palike and/or from concerned Authorities by the Second Party (to be obtained by Second Party at their cost).

(ii) On execution of an Allocation Agreement between the parties hereto identifying and allocating the areas falling to the share of the First Party and the share of Second Party which shall be executed within Thirty days of Second Party delivering to First Party one set of sanction of licence and plan by Bruhat Bangalore Mahanagara Palike/other authorities.

1.2. That on execution of Allocation Agreement, the Second Party will be permitted to enter Schedule Property and Second Party is empowered to develop the Schedule Property by constructing residential buildings therein as per the Sanctioned plans, subject to terms of this Agreement.

1.3. Such permission to develop the Schedule Property shall however not be construed as delivery of possession under section 53A of Transfer of Property Act read with section 2(47)(v) of the Income Tax Act of 1961. The legal possession of Schedule Property shall continue to vest in the First Party at all times including during the course of development and at no time the Second Party is entitled to claim exclusive possession of the Schedule Property. The Second Party shall not be entitled to possession of the proportionate share in the land in the Schedule Property in part performance until issue of Certificate of Completion of the respective buildings and completion and delivery to First Party 'OWNERS AREA' referred to in this Agreement in such building as agreed to under this Agreement and specifically allocated for First Party as per the Allocation Agreement."

Sample 2

"1. PERMISSION FOR DEVELOPMENT:

1.1. The Owner is in possession and enjoyment of the Schedule Property. The Owner hereby authorize the Promoter for the purpose of development, to enter upon the Schedule Property and develop the same, however the authority so granted does not in any manner be construed as delivery of possession by the Owner in part performance of this agreement under section 53-A of the Transfer of Property Act or under section 2(47)(iv) of the Income Tax Act, 1961.

1.2. The Owner hereby agrees not to interfere or interrupt in the course of construction and development of the Schedule Property and/or commit any act or omission having the effect of delaying or stopping the work that has to be done under this Agreement. However, the Owner shall always be entitled to inspect the progress of the work and type of work which is being done on the Schedule Property."

Other Important updates

a. The Central Board of Direct Taxes (CBDT) has revised the 'E-assessment Scheme, 2019' notified on September 12, 2019. Now, e-assessment scheme shall be called Faceless Assessment. Now, the National e-Assessment Centre shall intimate the assessee for conduct of faceless assessment in case wherein notice has been issued by AO. The Board has also extended its scope to cover best judgment assessments.

b. The Prime Minister of India, Shri Narendra Modi has launched platform for 'Transparent Taxation – Honoring the Honest' to carry forward the journey of direct tax reforms. The PM has unveiled Faceless assessments, Faceless appeals & Taxpayers Charter. The event has been witnessed by various Chambers of Commerce, Trade Associations, Chartered Accountant's associations and also eminent taxpayers, apart from the officers and officials of Income-tax Department.

c. The Central Board of Direct Taxes (CBDT) has directed that all the assessment shall be passed by the National e-Assessment Centre through the Faceless Assessment Scheme, 2019. However, the board has provided two exception as well. Assessment orders in cases assigned to Central Charges & International Tax Charges.

d. Jurisdiction of income-tax authorities have been defined under section 120 of the Income-tax Act, 1961. Following the implementation of faceless assessment to all taxpayer as announced by the PM Shri Narendra Modi, the Central Board of Direct Taxes (CBDT) has amended jurisdiction of various designation of the Income-tax Authorities.