

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", KOLKATA
[Before Hon'ble Shri M.Balaganesh, AM & Shri S.S.Vishwanetra Ravi, JM]

ITA No.67/Kol/2013
Assessment Year : **2008-09**

(APPELLANT)		(RESPONDENT)
Sri Rampada Panda	-versus-	I.T.O., Ward-2,
Purba Medinipur		Haldia.
(PAN : AHNPP 8129 P)		

For the Appellant : Shri Manish Tiwari, FCA
For the Respondent : Shri Pinaki Mukherjee, JCIT

Date of Hearing : 01.10.2015.
Date of Pronouncement : 7.10.2015.

ORDER

Per Shri M.Balaganesh, AM

1. This appeal of the assessee arises out of the order of the Learned CIT(A) in Appeal No94/CIT(A)-XXXIII/ITO.Ward-2,Hal/10-11 dated 5.10.2012 for the Asst Year 2008-09 passed against the order of assessment framed by the Learned AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').
2. The first issue to be decided in this appeal is as to whether the addition u/s 40A(3) of the Act could be made in the sum of Rs. 62,06,269/- in the facts and circumstances of the case.
3. The brief facts of this appeal is that the assessee is a proprietor of M/s Basanti Distributors engaged in the retail trading of poultry feeds . During the assessment year under appeal, the assessee made cash payments in excess of Rs. 20,000/- to a party M/s Pickme Feeds to the tune of Rs. 62,06,269/-. The books of accounts were not produced by the assessee before the Learned AO. Only certain details such as bank statements, debtors list, purchasers' name and address, copy of debit vouchers regarding carriage outwards, inventory details were produced for verification. The Learned AO sought to obtain information u/s 133(6) from one of the suppliers M/s Pickme Feeds from whom the assessee has purchased poultry feeds and from the

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ledger account of assessee as appearing in the books of Pickme Feeds produced by the said party , it was found that the assessee had made cash payments to the said party in excess of Rs. 20,000/- in a day in violation of section 40A(3) of the Act read with Rule 6DD of IT Rules. Accordingly, a sum of Rs. 62,06,269/- was disallowed u/s 40A(3) of the Act which was also confirmed by the Learned CITA. Aggrieved, the assessee is in appeal before us on the following grounds:-

*“1(a) That on the facts and in the circumstances of the case, Ld. CIT(Appeals) has erred in confirming the action of Assessing Officer who made disallowance u/s 40A(3) by referring to cash receipts recorded in assessee’s ledger maintained by Pickme Fees.
1(b) That on the facts and in the circumstances of the case, Ld. CIT(A) is not justified in sustaining disallowance made by Assessing Officer without appreciating the assessee’s explanation that purchases were made by time to time cash deposit in the account of Pickme Feeds without any violation of the provisions contained in Section 40A(3) of I.T.Act, 1961.
1(c)That on the facts and in the circumstances of the case, the action of Ld. CIT(A) to confirm the disallowance of Rs.62,06,629/- u/s 40A(3) of I.T.Act, 1961 is not maintainable in law.”*

3.1. Shri.Manish Tiwari, FCA, the Learned AR argued on behalf of the assessee and Shri.Pinaki Mukherjee, JCIT, the Learned DR argued on behalf of the revenue.

3.2. The Learned AR argued that the poultry feeds are made out of maize and soya and hence come under the ambit of agricultural produce and accordingly his case is covered under the exceptions provided in Rule 6DD(e)(i) of the Income Tax Rules, 1962 as payment is made for procuring agricultural produce. He also argued that the payments made for purchase of produce of animal husbandry or dairy or poultry farming and hence would fall under the exceptions provided in Rule 6DD(e)(ii) of the Income Tax Rules, 1962. He further argued that the area in which the poultry feeds business were operated by the assessee were drastically affected by swine flu and hence the assessee was forced to make payments in cash to M/s Pickme Feeds and it was also made as per the forced directions of the concerned supplier M/s Pickme Feeds. Hence it was paid in order to provide uninterrupted supply of poultry feeds to the farmers in the rural areas and the business expediency in this entire gamut of transactions and the genuineness of the same are never doubted by the revenue. The

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Learned AR argued that the supplier of poultry feeds M/s Pickme Feeds had deputed their representatives to the assessee's customer location (i.e parties to whom poultry feeds is sold by the assessee) and received the sale proceeds directly from the said customer and deposited the same in the bank account of M/s Pickme Feeds for purchase of poultry feeds . Hence the assessee had no control over this transaction as he is carrying on his business in a rural area at Vill-Kishore Nagar, P.O. & P.S. Contai Dist. Purba Medinipur. He further argued that the assessee was having only one bank account in a co-operative bank and it practically takes 4-5 days for clearance of a single cheque issued by him to the supplier. The Learned AR further placed a letter dated 23.3.2007 from the supplier of Poultry Feeds M/s Pickme Feeds wherein the concerned supplier had mandated to receive only cash payments in order to have uninterrupted supply of poultry feeds to the assessee on a timely basis and in the event of payment by cheques, the supply of goods to the assessee would be made only after clearance of the cheques. He also argued that since the payments were directly deposited in the bank account of M/s Pickme Feeds by the supplier deputing his representatives to collect the sale proceeds of the assessee from his customers, the transactions should be treated as payments made by the assessee to his agent and accordingly would fall automatically under the exception clause provided in Rule 6DD(k) of the Income Tax Rules, 1962. In response to this, the Learned DR argued that purchase of poultry feeds does not fall under the category of agricultural produce and further relied on the orders of the lower authorities.

3.3. We have heard the rival submissions and perused the materials available on record. We find that though the assessee had raised three grounds on this issue but all the grounds centre only around the disallowance u/s 40A(3) of the Act and hence they are taken up together. Admittedly, the assessee had made payments to M/s Pickme Feeds in cash by directly depositing cash in the bank account of M/s Pickme Feeds for supply of poultry feeds to the assessee. The assessee in turn supplies the poultry feeds to various farmers in the rural areas. It is observed that the assessee in terms of his contract is bound to maintain constant and uninterrupted supplies of poultry feeds and also ensure that at no point in time, the farmers are deprived of such material.

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Apparently, the concerned supplier M/s Pickme Feeds insisted on cash payments for ensuring continuity and timely supplies as could be evident from the letter dated 23.3.2007 of the concerned supplier. These facts are not in dispute. We find that the revenue had not doubted the genuineness of the payments made to the aforesaid party by the assessee.

3.3.1. We are not in agreement with the argument of the Learned AR that the payment is made to an agent and that the relationship of the assessee with this supplier is one of principal and agent and as such, the assessee's case falls under the exception provided in Rule 6DD(k) of IT Rules. However, we are in agreement with the arguments of the Learned AR that the purchase of poultry feeds falls under the exceptions clause provided in Rule 6DD(e) of the Income Tax Rules, 1962. For the sake of convenience, the relevant rule is reproduced here in below:-

6DD(e) Where the payment is made for the purchase of -

(i) agricultural or forest produce ; or

(i) the produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming;

.....

To the cultivator , grower or producer of such articles, produce or products.

3.3.2. We also agree the pressing emergency for the assessee to make payments in cash to M/s Pickme Feeds as the assessee was operating only in co-operative bank in his village which was practically taking 5-6 days for clearing a single cheque issued by the assessee to his suppliers and hence the supplier had insisted for payments in cash for uninterrupted and timely supplies of poultry feeds for onward supply of the same by the assessee to the farmers in the rural areas which is affected severely by swine flu.

3.3.3. We hold that since the genuinity of the payments made to the party is not doubted by the revenue, the provisions of section 40A(3) could not be made applicable to the facts of the instant case. It is observed that the assessee had taken

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enough precautions from his side to ensure that the payee also don't escape from the ambit of taxation on these receipts by directly depositing the cash in the bank account of the payee. This fact is also not disputed by the revenue. It will be pertinent to go into the intention behind introduction of provisions of section 40A(3) of the Act at this juncture. We find that the said provision was inserted by Finance Act 1968 with the object of curbing expenditure in cash and to counter tax evasion. The CBDT Circular No. 6P dated 6.7.1968 reiterates this view that *“this provision is designed to counter evasion of a tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the department as to the identity of the payee and reasonableness of the payment.”*

3.3.4. In this regard, it is pertinent to get into the following decisions on the impugned subject:-

Attar Singh Gurmukh Singh vs ITO reported in (1991) 191 ITR 667 (SC)

“Section 40A(3) of the Income-tax Act, 1961, which provides that expenditure in excess of Rs.2,500 (Rs.10,000 after the 1987 amendment) would be allowed to be deducted only if made by a crossed cheque or crossed bank draft (except in specified cases) is not arbitrary and does not amount to a restriction on the fundamental right to carry on business. If read together with Rule 6DD of the Income-tax Rules, 1962, it will be clear that the provisions are not intended to restrict business activities. There is no restriction on the assessee in his trading activities. Section 40A(3) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted upon to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of income from undisclosed sources. The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and rule 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions.”

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CIT vs CPL Tannery reported in (2009) 318 ITR 179 (Cal)

“The second contention of the assessee that owing to business expediency, obligation and exigency, the assessee had to make cash payment for purchase of goods so essential for carrying on of his business, was also not disputed by the AO. The genuinity of transactions, rate of gross profit or the fact that the bonafide of the assessee that payments are made to producers of hides and skin are also neither doubted nor disputed by the AO. On the basis of these facts it is not justified on the part of the AO to disallow 20% of the payments made u/s 40A(3) in the process of assessment. We, therefore, delete the addition of Rs. 17,90,571/- and ground no.1 is decided in favour of the assessee. “

CIT vs Crescent Export Syndicate in ITA No. 202 of 2008 dated 30.7.2008 – Jurisdictional High Court decision

“It also appears that the purchases have been held to be genuine by the learned CIT(Appeal) but the learned CIT(Appeal) has invoked Section 40A(3) for payment exceeding Rs.20,000/- since it is not made by crossed cheque or bank draft but by hearer cheques and has computed the payments falling under provisions to Section 40A(3) for Rs.78,45,580/- and disallowed @20% thereon Rs.15,69,116/-. It is also made clear that without the payment being made by bearer cheque these goods could not have been procured and it would have hampered the supply of goods within the stipulated time. Therefore, the genuineness of the purchase has been accepted by the ld. CIT(Appeal) which has also not been disputed by the department as it appears from the order so passed by the learned Tribunal. It further appears from the assessment order that neither the Assessing Officer nor the CIT(Appeal) has disbelieved the genuineness of the transaction. There was no dispute that the purchases were genuine.”

Anupam Tele Services vs ITO in (2014) 43 taxmann.com 199 (Guj)

“Section 40A(3) of the Income-tax Act, 1961, read with rule 6DD of the Income-tax Rules, 1962 – Business disallowance – Cash payment exceeding prescribed limits (Rule 6DD(j)-Assessment year 2006-07 – Assessee was working as an agent of Tata Tele Services Limited for distributing mobile cards and recharge vouchers – Principal company Tata insisted that cheque payment from assessee’s co-operative bank would not do, since realization took longer time and such payments should be made only in cash in their bank account – If assessee would not make cash payment and make cheque payments alone, it would have received recharge vouchers delayed by 4/5 days which would severely affect its business operation – Assessee, therefore, made cash payment – Whether in view of above, no disallowance under section 40A (3) was to be made in respect of payment made to principal - Held, yes [Paras 21 to 23] [in favour of the assessee]”

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Sri Laxmi Satyanarayana Oil Mill vs CIT reported in (2014) 49 taxmann.com 363 (Andhrapradesh High Court)

“Section 40A(3) of the Income-tax Act, 1961, read with Rule 6DD of the Income-tax Rules, 1962 – Business disallowance – Cash payment exceeding prescribed limit (Rule 6DD) – Assessee made certain payment of purchase of ground nut in cash exceeding prescribed limit – Assessee submitted that her made payment in cash because seller insisted on that and also gave incentives and discounts – Further, seller also issued certificate in support of this – Whether since assessee had placed proof of payment of consideration for its transaction to seller, and later admitted payment and there was no doubt about genuineness of payment, no disallowance could be made under section 40A(3) – Held, yes [Para 23] [In favour of the assessee]”

CIT vs Smt. Shelly Passi reported in (2013) 350 ITR 227 (P&H)

In this case the court upheld the view of the tribunal in not applying section 40A(3) of the Act to the cash payments when ultimately, such amounts were deposited in the bank by the payee.

3.3.5. It is pertinent to notice that the primary object of enacting section 40A(3) was two fold, firstly, putting a check on trading transactions with a mind to evade the liability to tax on income earned out of such transaction and, secondly, to inculcate the banking habits amongst the business community. Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequence, which were to befall on account of non-observation of section 40A(3) must have nexus to the failure of such object. Therefore, the genuineness of the transactions it being free from vice of any device of evasion of tax is relevant consideration. In the instant case, the cash has been deposited directly in the bank account of the supplier i.e M/s Pickme Feeds by the assessee.

3.3.6. *The Hon’ble Apex Court in the case of CTO vs Swastik Roadways reported in (2004) 3 SCC 640 had held that the consequences of non-compliance of Madhyapradesh Sales Tax Act , which were intended to check the evasion and avoidance of sales tax were significantly harsh. The court while upholding the constitutional validity negated the existence of a mens rea as a condition necessary for levy of penalty for non-compliance with such technical provisions required held that*

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“in the consequence to follow there must be nexus between the consequence that befall for non-compliance with such provisions intended for preventing the tax evasion with the object of provision before the consequence can be inflicted upon the defaulter.” The Supreme Court has opined that the existence of nexus between the tax evasion by the owner of the goods and the failure of C & F agent to furnish information required by the Commissioner is implicit in section 57(2) and the assessing authority concerned has to necessarily record a finding to this effect before levying penalty u/s 57(2).

Though in the instant case, the issue involved is not with regard to the levy of penalty, but the requirement of law to be followed by the assessee was of a technical nature as was in the case of *Swastik Roadways* (3 SCC 640) and the consequence to fall for failure to observe such norms in the present case are much higher than which were prescribed under the Madhya Pradesh Sales Tax Act. Apparently, it is a relevant consideration for the assessing authority under the Income Tax Act that before invoking the provisions of section 40A(3) in the light of Rule 6DD as clarified by the Circular of the CBDT that whether the failure on the part of the assessee in adhering to requirement of provisions of section 40A(3) has any such nexus which defeats the object of provision so as to invite such a consequence. We hold that the purpose of section 40A(3) is only preventive and to check evasion of tax and flow of unaccounted money or to check transactions which are not genuine and may be put as camouflage to evade tax by showing fictitious or false transactions. Admittedly, this is not the case in the facts of the assessee herein. The assessee had directly deposited cash in the bank account of the supplier M/s Pickme Feeds which fact is also acknowledged by the concerned supplier by crediting the said cash receipts in the ledger account of the assessee and the same ledger account has been obtained by the Learned AO u/s 133(6) directly from the concerned supplier M/s Pickme Feeds. It is also pertinent to note that the Hon'ble Rajasthan High Court in the case of *Smt. Harshila Chordia vs ITO reported in (2008) 298 ITR 349 (Raj)* had held that the exceptions contained in Rule 6DD of Income Tax Rules are not exhaustive and that the said rule must be interpreted liberally.

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In view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we have no hesitation in deleting the addition made in the sum of Rs. 62,06,269/- u/s 40A(3) of the Act. Accordingly, the ground no. 1 of the assessee is allowed.

4. The Ground No. 2 raised by the assessee towards disallowance u/s 40(a)(ia) of the Act is not pressed by the Learned AR as informed by him during the course of hearing before us and the same is reckoned as a statement from the Bar. Accordingly, the ground no. 2 of the assessee is dismissed as not pressed.

In the result, the appeal of the assessee is partly allowed.

Order pronounced in the court on 07.10.2015.

Sd/-
[S.S.Vishwanetra Ravi]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Date: 07.10.2015.
R.G.(.P.S.)

Copy of the order forwarded to:

1. Sri Rampada Panda., At-Kishorenagar, Contai, Purba Medinipore-721401.
- 2 The I.T.O., Ward-2, Haldia..
3. The CIT-XVIII, Kolkata,
4. The CIT(A)-XXXIII, Kolkata.
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches

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