

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.2518/Kol/2013 Assessment Year :2009-10

Nasir Ahmed 30/2A, Rani Rashmoni Road, Kolkata-700 087 [PAN No.ADCPA 1080 B]	V/s.	Income Tax Officer, Ward-33(3), 3 rd Floor, 10B, Middleton Row Kolkata-700 071
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	Shri A.K.Tibrewal, FCA
प्रत्यर्थी की ओर स/By Respondent	Shri Klyan Nath, JCIT-DR
सुनवाई की तारीख/Date of Hearing	25-05-2016
घोषणा की तारीख/Date of Pronouncement	03-06-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-XIX, Kolkata in appeal No.267/CIT(A)-XIX/Ward-33(3)/Kol/12-13 dated 24.09.2013. Assessment was framed by ITO Ward-33(4), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.12.2011 for assessment year 2009-10.

2. First ground in this appeal is that Ld. CIT(A) erred in confirming the action of Assessing Officer by sustaining the disallowance of ₹4,14,003/- on account of cash payment exceeding or ₹ 20,000/-, therefore the following the provision of Sec. 40A(3) of the Act.

3. Facts in brief are that assessee is an individual and engaged in the business of decorator and supplying goods on hire. During the year assessee has claimed expenses for a sum of ₹27,85,984/- on account of labour charges. The AO during assessment observed that out of the aforesaid sum the payment in cash for ₹4,14,003/- was exceeding the single payment of ₹20,000/-. Therefore the assessee has violated the provision of Sec. 40A(3) of the Act. Accordingly the AO disallowed the same and added back to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A), where assessee submitted that payments were made to casual workers who were hired on daily basis and in none of case payments exceed more than ₹20,000/-. It was further submitted that assessee for making these wages payment has made single voucher but the payment was made to several labours. However the Ld. CIT(A) disregarded the claim of assessee and confirmed the action of AO by observing as under:-

*"I have carefully considered the appellant's submission and the basis of the disallowance made by the AO in this regard. Section 40A(3) is a very point section of the Act to be read with Rule 6DD of the IT Rules. Unless covered by the said rule, any single transactions in excess of ₹20,000/- and which could not be explained by the appellant. Now the plea taken by the appellant as narrated (supra) cannot exonerate him from the clutches of section 40A(3) and also I find that the appellant;' case is not covered by any of the exceptions contained in Rule 6DD. Hence, the addition made by the AO amounting to ₹4,14,003/- on this count is **confirmed**."*

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

Shri A.K.Tibrewal, Ld. Authorized Representative appearing on behalf of assessee and Shri Kalyan Nath, Ld. Departmental Representative appearing on behalf of Revenue.

5. Before us Ld. AR submitted paper book which is running pages from 1 to 1 to 75 and index of various judgments containing pages 1 to 35 respectively. At the time of hearing our attention was drawn on pages 1 to 4 of the PB, where the detail for the payment of labour charges was recorded and claim that in none of the case excess payment was exceeding of ₹20,000/-. Ld. AR further drew our attention at pages 6 to 41 where the vouchers in respect of labour placed. On the basis of those vouchers it was further submitted that where the payments exceeds more than ₹20,000/- it was paid to the labour Sardars who in turn make the payment to several labourers. All the payments made to the labourers are genuine and without violating the provisions of section 40A(3) of the Act. The Id. AR left the issue before the Bench to decide according to merit.

On the other hand, Ld. DR submitted that in most of the cases, payment is exceeding ₹20,000/- and there is clear-cut violation of provision of Sec.40A(3) of the Act. He further stated that as per provision of Sec.40A(3) of the Act, the payment should not be made and the section does not talk about genuine or non-genuine expenses. At the time of assessment no such details were submitted by assessee and he vehemently relied on the orders of Authorities Below.

6. We have heard the rival contentions and perused the materials available on record. From the aforesaid discussion, we find that payments were made to labourers exceeding ₹20,000/-. Therefore, AO invoked the provision of Sec.40A(3) and disallowed the same, which was subsequently confirmed by Ld. CIT(A). Now the question before us arises so as to payment made to the labourers in the instant case is in violation of provision of Sec.40A(3) of the Act. However we find that the genuineness of the expenses has not been doubted in the present case. We find that on similar issue, this Hon'ble Tribunal has allowed this issue in favour of assessee where the genuine of the payment was not doubted. In this connection we are putting our

reliance in the case of *Sri Manoranjan Raha vs. ITO* in **ITA No.1448/Kol/2011** dated 18.11.2015, wherein the Tribunal has held as under:-

“4.3. We have heard the rival submissions and perused the materials available on record. We find that the payments made by cash in violation of section 40A(3) of the Act have been duly acknowledged by the recipient Shri Amit Dutta who had deposed before the learned AO and confirmed the fact of receipt of monies in cash. Hence the genuinity of payments made by the assessee stands clearly established beyond doubt. Even for the amounts enhanced by Learned CIT(A) in the sum of Rs.54,01,473/-, the genuineness of the payments and the necessity to incur the said expenditure for the purpose of business of the assessee was never disputed by the Learned CIT(A). We hold that since the genuinity of the payments made to the parties 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 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.”

In the instant case, the genuineness of the payments has not been doubted. Besides the above we also find that from the submission made by Ld. AR that none of the case, the payment has exceeded more than ₹20,000/- and where the payment was exceeding more than ₹20,000/- it was paid to the sardars who further paid to individual labourers. In rejoinder Ld. DR has also failed to bring anything contrary to the argument placed by Ld. AR before us. Therefore in our considered view in none of case the payment in the instant case is inconsistent to the provision of section 40A(3) of the Act and taking a consistent view of the Co-ordinate Bench of this Tribunal in the case of *Sri Manoranjan Raha* (supra) we are inclined to reverse the orders of Authorities Below. This ground of assessee's appeal is allowed.

7. Next ground in this appeal of assessee is that Ld. CIT(A) erred in confirming the action of AO by sustaining the addition of ₹1,24,108/- on account of bogus purchase, which is reproduced below:-

“2. For that on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) erred in law in confirming the addition of Rs.124108 made by the A.O on account of bogus purchases as the same are duly evidenced by incontrovertible evidence and therefore it needs to be deleted.”

8. During the year assessee has purchased goods worth ₹1,24,108/- from Mr. Samiran Dutta but on verification u/s133(6) of the Act it was found that notice was returned by Postal Authority with the remarks “not known”. Accordingly, AO disallowed the purchase made by assessee for an amount of ₹1,24,108/- and added it to the income of assessee.

9. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who upheld the action of AO by observing as under:-

*“On examining the issue, I do not agree with the contention of the appellant. If the seller is not traceable at the address, the appellant should have produced him so that the transactions could be verified. There is no merit in this ground and accordingly it is rejected and the addition on this count amounting to ₹1,24,108/- is **confirmed**.”*

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

10. Before us Ld.AR submitted that the goods were also purchased from Mr. Samiran Dutta in the AY 2010-11 which is not before us for an amount of ₹6,05,412/- and the same was added by AO as bogus purchase but Ld. CIT(A) deleted the addition made by AO that notice/s. 133(6) was issued and party confirmed the same. Shri Samiran Dutta was filing his income tax return u/s 44F which does not require maintenance of his books of account.

In rejoinder Ld. DR submitted that each year is a separate year and party under consideration by the assessee failed to provide the address of the party and vehemently supported the orders of Authorities Below.

11. From the aforesaid discussion, we find that AO disallowed the purchases from Mr Samiran Dutta on the ground that notice for verification was not served u/s. 133(6) of the Act but Ld. AR has produced the same before appellate stage for AY 2010-11. So the identity of the party (Mr. Samairan Dutta) cannot be doubted for instant case and for the year under consideration. The copy of the order of Ld. CIT(A) is placed at page 68 of the paper book. In this view of the matter and after considering assessment order for AY 2010-11, we are of the considered view that the party is not identifiable and so the purchase cannot be held bogus. Therefore we are inclined to reverse the orders of Authorities Below. This ground of assessee's appeal is allowed.

12. Next ground is as regards that Ld. CIT(A) erred in confirming the action of AO by sustaining disallowance of ₹31,59,970/-. For this, assessee has raised following ground:-

“3. For that on the facts and in the circumstances of the case, the Ld. Commissioner of Income tax (Appeals) erred in law in confirming the addition of Rs.3159970 made by the AO on the ground that the amount represents income of the appellant because there has been remission and/or cessation of several accounts comprised in the amount in terms of S.41(1) of income tax Act.”

13. During the year under consideration, as many as 19 creditors for a value of ₹31,59,970/- appearing in the balance-sheet of assessee but at the assessment proceeding, AO sought a clarification from the assessee regarding the names and addresses along with PAN of the creditors with the details of the transactions. Accordingly the assessee submitted a list of creditors but without the addresses and submitted that these are old creditors, therefore addresses are not available. Accordingly, AO sought clarification from assessee about the genuineness of the creditors. In compliance thereto assessee submitted that said creditors were also appearing in his balance-sheet relating to AY 2006-07 and these are examined by the predecessor while making the scrutiny assessment for AY 2006-07. However, AO

disregarded the plea of assessee and treated the same as income of assessee u/s 41(1) of the Act.

14. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who upheld the action of AO by observing as under:-

“10.1 Both the assessment order and the submissions of the appellant have been considered. Section 41(1) becomes applicable only when past liability ceases or is remitted. A cessation of liability for the purpose of section 41(1) would mean irrevocable cessation so that there is no possibility of the liability being revived in future. The Calcutta High Court in the case of Kesoram Industries & Cotton Mills Ltd. v. CIT [1992] 196 ITR 845 (Cal) held that whether the liability of the assessee has been fully discharged is within the special knowledge of the se. he has to prove that in fact the liability subsists. Where the conduct and surrounding circumstances demonstrate that the amount has been remitted or forgone or the sum has ceased to be claimable, the liability of the assessee would cease. In this regard it was found that the appellant has not made any transactions with these parties but the AO. It is needless to say that year after year opening balances were carried forward to closing balances just to keep the balance of sundry creditors alive.

In my view such sums have ceased to be claimable by the appellant. It would be a clear case of remission or cessation of the liability of the assessee. It is needless to say that as per section 59(1) of the Act, the provision of section 41(1) applies to income under the head 'Other Sources' also.”

Being aggrieved by this order of Ld. CIT(A), assessee came in second appeal before us.

15. Before us Ld. AR submitted that these creditors are pertinent to earlier years and drew our attention at pages 47 to 50 of the paper book where the list of creditors along with other details were placed and he left the issue to the discretion of the Bench.

On the other hand, Ld DR submitted that assessee failed to submit the addresses of the creditors and those creditors have been appearing more than three years for which no confirmation has been submitted by assessee. He relied on the orders of Authorities Below.

16. We have heard rival contentions and perused the materials available on record. From the aforesaid discussion, we find that certain old creditors are

reflecting in the balance sheet of assessee and none of the sundry creditors was written off in the books of account of assessee. In our considered view the income cannot be brought to tax u/s 41(1) of the Act until and unless the trading liability ceased to exist in the books of account. In the instant case the liability of the sundry creditors is very much appearing. Therefore, the question of treating the same as income u/s 41(1) of the Act does not arise. In this connection, we are putting our reliance on several case laws which are cited below:-

- (a) CIT vs. Bhogilal Ramjibhai Atara (2014) 43 taxmann.com 55 (Guj)
- (b) Pr. CIT vs. Matruprasad C Pandey (2015) 59 taxmann.com 428 (Guj)
- © ITO vs. Jaggi Ispat Pvt. Ltd. ITA No.755/Kol/2014 dated 19.01.2015
- (d) Mangal Chand & Sons vs. ITO ITA No.157/Kol/2014 dated 31.07.2015
- (e) Recon Valves Co. v. DCIT ITA Nos.2680-2681/Kol/2013 dated 14.08.2015
- (f) ACIT vs. Lekha Rani Gupta ITA No.2081/Kol/2010 dated 31.10.2011

Now we have to take one of the case law cited above in the case of *Recon Valves Co.* (supra), where the Co-ordinate Bench of this Tribunal has held as under:

*"4. We find that assessee has not written off the sundry creditors and these are existing liabilities outstanding in the books of accounts of the assessee. Once the liabilities are outstanding whether in such cases, provision of Section 41(1) of the Act can be invoked. From the perusal of Sec.41(1) of the Act, we are of the view that the requirement of obtain a benefit can be said to have satisfied if the cash is actually received or adjustment entry is made. The provision of Sec.41(1) comes into operation where the assessee has incurred a trading liability and trading liability has been allowed as a deduction in any earlier year, and something has, later on, being recovered in respect of such liability or such liability has either been remitted or has seized to exist. Hon'ble jurisdictional High Court in the case of CIT v. S/.K. Reference Ltd. (1994) 768 taxmann 252 (Cal) has held that where the liability to pay commissions on sugarcane was later allowed as deduction pursuant to State Governments Ordinance which was later enacted into Act, provision for such liability cannot be taxed by invoking the provision of Sec.41(1) of the Act on the mere ground that amount allowed was returned back to profit and loss account, unless such liability was remitted or seized to exist. In view of the above, we are of the view that in the present case, the liability very much in existence in on account of sundry credit and this is trading liability and once it is not seize to exist, or remitted, the mere non-existence of the parties cannot be added as an **income** of the assessee. Accordingly, this appeal of assessee is allowed*

on merits. Similarly, issue in **ITA No.2680/Kol/2013** for AY 2000-01, wherein only set off of sundry creditors to the extent of Rs.9,78,152/- and carried forward from earlier year, as the appeal for AY 2000-01 has already been allowed in favour of assessee, this will not be treated as **income** for AY 2001-02. Hence, these two appeals of assessee are allowed. As regard to the ground on jurisdictional issue, for initiation of proceedings u/s. 148 r.w.s. 147 of the Act, Ld. counsel for assessee has not pressed this grounds and hence, same are dismissed are not pressed.”

Taking a consistent view of the cases cited and the decision of one of the case law in the case of *Recon Valves Co.* (supra) we are inclined to reverse the orders of Authorities Below. This ground of assessee's appeal is allowed.

17. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 03/06/2016

Sd/-
(S.S.Viswanethra Ravi)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 03/06/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Nasir Ahmed, 30/2A, Rani Rashmoni Road, Kolkata-87
2. प्रत्यर्थी/Respondent-ITO Ward-33(3), 3rd Fl, 10B, Middleton Row, Kolkata-71
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदष्ट सऱ

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।