

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

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No. 200/Kol/2014

Assessment Year : 2009-10

Motor Ch. Mondal
Sahid Khudi Ram Sarani
Neamatpur, P.O.Sitarampur-713359
[PAN : AFAPM 9913K]
(Appellant)

-vs.-

I.T.O., Ward-2(2)
Asansol

(Respondent)

For the Appellant : Shri U.Dasgupta, Advocate
For the Respondent : Shri.Rajat Kumar Kureel(DR)

Date of Hearing : 11.08.2016

Date of Pronouncement : 02.09.2016.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order dated 25.11.2013 of CIT(A)-Asansol, relating to AY 2009-10.

2. The Assessee is an individual. He is a dealer in country spirits. Purchases are made from a single party namely Asansol Bottling & Packaging Co. Pvt. Ltd, Asansol. The assessee in respect of purchases from Asansol Bottling & Packaging Co. Pvt. Ltd made a payment of Rs.80,51,380/- in cash. According to the AO the above payment made cannot be allowed as deduction in computing the total income of the assessee because of the violation of the provision of section 40A(3) of the Income Tax Act, 1961 (Act). Another sum of Rs.2,18,000/- paid directly to the seller parties by cash. Invoking the provisions of Sec.40A(3) of the Act, the said sum was also disallowed and added to the total income of the Assessee. Thus in all a sum of Rs.82,70,180/- was disallowed and added to the total income by invoking the provisions of Sec.40A(3) of the Act. The action of the AO was confirmed by CIT(A).

3. Aggrieved by the order of CIT(A) the assessee has preferred an appeal before this Tribunal.

4. We have heard the rival submissions. Identical issue with regard to the disallowance u/s 40A(3) of the Act in the case of assessee 's case who are engaged in the business of country spirits which had come up for consideration before this Bench in the case of Ramnagar Pachwai and C.S. (Shop) vs ITO vide ITA No.148/Kol/2015 and 185&186/Kol/2014 for A.Y.2007-08 and 2008-09 and 2010-11 respectively. This Tribunal vide its order dated on identical issue has held as follows :-

“13. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee comprising of various orders of lower authorities vide pages 1 to 42 of the Paper Book, copy of Notification No. 1208-Ex dated 29.08.2005 issued by the Excise Department, Government of West Bengal vide pages 43 to 49 of PB and copies of various decisions of High Courts and Tribunals vide pages 50 to 102 of PB. We have also gone through the provisions of The West Bengal Excise Rules 2005 and The Bengal Excise Act, 1909. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. At the outset, we deem it necessary to incorporate the following clauses from the Notification issued by the Excise Department, Government of West Bengal , dated 29.8.2005 for the sake of better understanding of the facts :-

“In exercise of the power conferred by section 85 and section 86 of the Bengal Excise Act, 1909 (Ben. Act V of 1909) and in supersession of the rules published with this Department Notification No. 122-EX/O/IR-1/2000 dated 23.2.2000, as subsequently amended, the Governor is pleased hereby to make the following rules regulating the issue and removal of country spirit on payment of duty in labelled and capsuled bottles from country spirit bottling plants and in bulk from warehouses by the licensed wholesale vendors of the same for the purpose of selling country spirit by wholesale:—

Rules

1. Short Title and commencement.—(1) These rules may be called the West Bengal Excise (Supply of Country Spirit on Payment of Duty) Rules, 2005. (2) These rules shall come into force from 19th October, 2005. 2. Definitions.—(1) In these rules, unless there is anything repugnant in the subject or context—

- (i) “Commissioner” means the Excise Commissioner;*
- (ii) “requisition” means the requisition submitted by the authorized representative of licensed wholesale vendor of country spirit in Form II appended to these rules;*
- (iii) “retail vendor” means the person holding license in the prescribed form for retail vending of country spirit, granted by the Collector; 189;*

- (iv) “State Government” means the Government of West Bengal;
- (v) “the Act” means the Bengal Excise Act, 1909 (Ben. Act V of 1909);
- (vi) “transport pass” means the transport pass issued in Form III appended to these rules;
- (vii) “warehouse” means the warehouse for supply of country spirit to retail vendors, established at convenient places by the Commissioner at the expense of the State Government, or at the expense of a person to whom the exclusive privilege of supplying or selling country spirit by wholesale has been granted under section 22 of the Act, or of a licensed wholesale vendor of country spirit;
- (viii) “wholesale licensee” means the wholesale vendor of country spirit to whom license has been granted in West Bengal Excise Form No. 26.

(2) Words and expressions used in these rules and not defined, but defined in the Act, shall have the meanings respectively assigned to them in the Act.

3. Issue only on payment of duty.—No country spirit in labelled and capsuled bottles shall be issued without payment of duty from a country spirit bottling plant. No country spirit in bulk shall be issued without payment of duty from a country spirit warehouse.

4. Personal Ledger Account to be maintained by the wholesale licensee.—The wholesale licensee shall maintain a Personal Ledger Account in accordance with the direction issued by the Commissioner from time to time for the purpose of maintaining an account—current of the duties payable by the wholesale licensee for the issues of country spirit to the retail vendors or transport on payment of duty from the concerned country spirit bottling plant or warehouse.

5. Minimum balance in Personal Ledger Account.—The Collector shall issue directions for maintaining the minimum amount “of balance in the aforesaid Personal Ledger Accounts in order to ensure that duty for daily issues of country spirit from the country spirit bottling plant or warehouse may be debited from the said account, leaving sufficient balance as may be determined by him.

6. Procedure of issue of country spirit.—(1) The retail vendor or his authorized representative shall submit to the representative of the wholesale licensee, through Excise Officer-in-Charge of the warehouse, a demand for issue of country spirit in Form I appended to these rules in duplicate. The duplicate copy shall be kept in the custody of the Excise Officer-in-Charge for his official record.

(2) No retail vendor of country spirit shall deposit duty direct into the local treasury for issue of country spirit to be taken by him from the warehouse concerned. Duty, cost price, bottling charge, if there be any, at the prescribed rate and other imposition, as may be prescribed by law, shall be paid by the retail vendor to the credit of the wholesale licensee concerned.

(3) The authorized representative of the wholesale licensee shall realize the necessary amount of duty, cost price and bottling charge, if there be any, at the prescribed rate and such other imposition, as may be prescribed by law, from the

retail vendor to whom country spirit is to be issued from the concerned warehouse. The authorized representative as above shall then submit requisition in duplicate in Form II appended to these rules to the Excise Officer-in-Charge of the warehouse separately for each of the retail vendors to whom country spirit is to be issued on the day.

(4) On receipt of the requisition in Form II, the Excise Officer-in-Charge of the warehouse shall allow issue of country spirit from the warehouse. Duplicate copy of the requisition shall be returned to the authorized representative of the wholesale licensee after the issue has been made.

(5) The Excise Officer-in-Charge of the warehouse shall issue transport pass to the retail vendor in Form III appended to these rules.

(6) Notwithstanding anything contained in any provisions of the rules, orders and notifications in this context, the wholesale suppliers of country spirit in labelled and capsuled bottles shall allow a rebate of five paise per bottle irrespective of measure from the bottling charge to the retail country spirit licensees whose licensed premises are located at a distance of 50 kilometres or more by the shortest route from the issuing warehouse on the basis of a certificate to be issued by the Collector in respect of distance.

At the end of the month, the wholesaler shall submit a bill in duplicate to the Officer-in-Charge of the warehouse claiming refund of the amount granted as rebate.

The Officer-in-Charge shall, on receipt of the bill, refund the amount claimed after verifying his records through adjustment in the Personal Ledger Account maintained for the purpose of privilege fee. In case there is no Personal Ledger Account for privilege fee at the warehouse, the Officer-in-Charge shall send a copy of the claim with his comments to the Officer-in-Charge of the supplier bottling plant, who shall refund the amount recommended to the wholesaler through adjustment in the Personal Ledger Account maintained for privilege fee.”

14. We find that the reliance placed on the decision of Co-ordinate Bench of Bangalore Tribunal in the case of Sri Renukeswara Rice Mills vs ITO reported in 93 ITD 263 (Bang Trib.) is well founded, wherein, it was held that the cash payment in the bank account of the payee is sufficient to get exemption in terms of Rule 6DD in as much it is ensured that the payee and payee alone receives the payment and the origin and conclusion of the transaction is traceable thereby fulfilling the criterion for ensuring the object of introduction of section 40A(3) of the Act.

15. We find that the following facts are undisputed and indisputable:-

- (a) The transactions made by the assessee is genuine.
- (b) The identity of the receiver (wholesale licensee) is established beyond doubt.
- (c) The payment is made in the bank account of the seller (wholesale

licensee).

We hold that since the genuinity of the payments made to the M/s Asansol Bottling & Packaging Co. Pvt. Ltd (wholesale licensee) 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 enough precautions from its 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. Moreover, the regulations of the West Bengal Government pursuant to notification from its Excise Department dated 29.8.2005 also mandates the payment to be made by way of direct deposit into the bank account of the wholesale licensee. This fact is also not disputed by the revenue.

16. 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."

17. 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)

" 3.3.4. 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."

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

The contention of the assessee that he purchased goods from suppliers who are producers of hides and skins, has not been refuted either by the AO or by the CITA. 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 M/s IFB Agro Industries Ltd for purchase of country spirit 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 bearer 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 Id. 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]”

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 groundnut in cash exceeding prescribed limit - Assessee submitted that he 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.

18. *We are not inclined to ignore the intention of the provisions of section 40A(3) of the Act by giving a plain reading of the same as argued by the ld DR. We find that the disallowance of the entire cash purchases results in abnormal trading profit for the assessee which it could never earn. We find a purposive construction should be resorted to while applying the provisions of the Act. Hence it would be more relevant to get into the intention of the legislature. In our opinion, 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 Asansol Bottling & Packaging Co. Pvt Ltd by the assessee.*

19. *We find that 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 "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 Asansol Bottling & Packaging Co. Pvt Ltd which fact is also accepted by the ld AO and mandated by the Notification dated 29.8.2005 issued by the Excise Department, Government of West Bengal. 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.

20. We also find that the impugned issue is also covered by the decision of the co-ordinate bench of this tribunal in the case of Ashok Mondal vs ITO in ITA No. 873/Kol/2012 for Asst Year 2009-10 dated 6.2.2014, wherein it was held that :-

“7. We have considered the rival submissions. At the outset a perusal of the decision in the case of Smt.Pushpalata Mondal shows that the Tribunal had decided the case by following the decision of Hon'ble Kerala High Court in the case of K.Abdu & Co. referred to supra wherein the issue was in relation to Rule 6DD(a) of IT Rules. The issue in the assessee's case is in respect of the payments made under the rules framed by the Government and such payment was required to be made in legal tender. A perusal of the Government Notification issued by the Govt. of West Bengal clearly shows that the dealers are agents of the Government and the payments made are to the Government. It also makes it categorically required that the payment is to be made before lifting of the country spirit. Consequently we are of the view that the issue is squarely covered by the decision of the Coordinate Bench of this Tribunal in the case of M/s.Amrai Pachwai & C.S.Shop referred to supra wherein it has been held as follows :-

“6. We have considered the rival submissions. At the outset a perusal of the assessment order clearly shows that the AO has recognized the assessee's business in trading of country spirit and country liquor. Copy of Form of Licence issued by Durgapur Municipal Corporation and copy of Form III issued by

Department of Excise, Govt. of W.B. were also found at pages 177 and 179 of the assessee's paper book. In any case the validity of licence of the assessee to trade in country spirit and country liquor is not the issue before us. The issue is whether the payments made by the assessee for the purchase of country spirit from the territorial licensee bottling plant, IFB Agro Industries Ltd., City Centre, Durgapur falls within the exemption provided under rule 6DD(b) of the I.T.Rules, 1962. Admittedly, the AO has recognized that the provision of Rule 6DD(b) of the I.T Rules, 1962 is applicable in case of payments made to government directly. This is found in page 2 of the assessment order. A perusal of the Kolkata Gazette Tuesday 20th Sept 2005 shows that the Government of West Bengal, Department of Excise has issued a notification, wherein the warehouse has been identified to mean the warehouse for supply of country spirit to the retail vendors, established at convenient places by the Commissioner at the expense of the State Government, or at the expense of a person to whom the exclusive privilege of supplying or selling country spirit by wholesale has been granted u/s 22 of the Act of a licensed wholesale vendor of country spirit. Further, it has been specifically identified that the authorised representative of the wholesale licensee shall realize the necessary amount of duty, cost price and bottling charge, if there be any, at the prescribed rate and such other imposition, as may be prescribed by law, from the retail vendor to whom the country spirit is to be issued from the concerned warehouse. It is also specifically mentioned in section (2) of the said notification that no retail vendor of country spirit shall deposit duty direct into the local treasury for issue of country spirit to be taken by him from the warehouse concerned which clearly shows that the warehouse is for the supply of the country liquor, specifically, the warehouse is under the direct control and custody of the State Govt. The State Government has closed its doors in so far as the local treasury is concerned and the payment for the purchase of country spirit or country liquor has to be made to the warehouse, run by the government. This shows that any payment made to the warehouse, which is under the direct control of the state government, is a payment made directly to the government. Once, this is accepted then the provisions of Rule 6DD(b) of the I.T Rules, 1962 which clearly spells out that the payment made to the government in legal tender under the rules framed by the Government, is exempted from the rigours of section 40A(3) of the Act. Here, it is noticed that the payments made by the assessee for purchase of country spirit and country liquor is to the government as per the notification issued by the government and is in legal tender specified by the notification. In the circumstances, we are of the view that the payment made by the assessee for the purchase of country liquor and country spirit from the territorial licensee bottling plant, IFB Agro Industries Ltd., City Centre, Durgapur is protected by the exemption in terms of Rule 6DD(b) of the I.T.Rules 1962. In the circumstances, the addition as made by the AO and as confirmed by the Id. CIT(A) by invoking the provisions of section 40A(3) of the I. T.Act 1961 stands deleted.

8. In the result the addition as confirmed by the Id. CIT(A) stands deleted.

We find that this decision was rendered by placing reliance on its earlier decision in the case of M/s Amrai Pachwai & C.S.Shop in ITA No. 1251/Kol/2011 dated 15.1.2014 and after considering the contrary decisions rendered in the case of Pushpalata Mondal in ITA No. 965/Kol/2010 dated 28.7.2011 and Hon'ble Kerala High Court in the case of CIT vs K Abdu & Co (170 Taxman 297). We find that the Co-ordinate Bench decision in the case of M/s Amrai Pachwai & C.S.Shop in ITA No. 1251/Kol/2011 dated 15.1.2014 and the held portion is reproduced hereinabove.

21. *We find that M/s Asansol Bottling & Packaging Co. Pvt Ltd is a bottling plant cum warehouse under Rule 2(vii) of The West Bengal Excise Rules 2005 with privilege granted u/s 22 of The Bengal Excise Act, 1909. At this juncture, it would be relevant to go into the definition of warehouse as provided under the State Excise Rules 2005 as below:-*

“Warehouse” , under Rule 2(vii) of the W.B.Excise Rules 2005 , means the warehouse for supply of country spirit to retail vendors, established at convenient places by the Commissioner at the expense of the State Government, or at the expense of a person to whom the exclusive privilege of supplying or selling country spirit by wholesale has been granted under section 22 of the Act, or of a licensed wholesale vendor of country spirit.

The above definition makes it clear that the ‘warehouse’ referred to under the State Excise Rules is under the direct control and authority of the Commissioner of State Excise because it is established by the Commissioner of State Excise and as such is a State Government establishment. It is also pertinent to note that the expenditure in relation to such warehouse is borne by the State Government or by the licensee to whom the exclusive privilege is granted u/s 22 of the Bengal Excise Act, 1909. Hence there could be no doubt that the warehouse is established by the State Excise Commissioner. Hence it could be safely concluded that the warehouse so established by the State Excise Commissioner is a State Government establishment. It would also be pertinent to note that the said warehouse has been specifically established for supply of country spirit to retail vendors (assessee herein) only and not to anybody else.

It would be pertinent to look into the definition of ‘Wholesale licensee’ as per Rule 2(viii) of the Excise Rules 2005 as below:-

Rule 2(viii) – “Wholesale licensee” means the wholesale vendor of country spirit to whom licence has been granted in West Bengal Excise Form No. 26.

It would be pertinent to look into Section 22 of The Bengal Excise Act, 1909 at this juncture as below:-

Section 22 – Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs

(1) The State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege –

- (a) of manufacturing, or supplying by wholesale, or*
- (b) of manufacturing, and supplying by wholesale, or*
- (c) of selling, by wholesale or retail, or*
- (d) of manufacturing or supplying by wholesale and selling retail, or*
- (e) of manufacturing and supplying by wholesale and selling retail,*

any country liquor or intoxicating drug within any specified local area:

Provided that public notice shall be given to the intention to grant any such exclusive privilege, and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner.

Hence it could be safely concluded that M/s Asansol Bottling & Packaging Co. Pvt Ltd (Bottling Plant) is a warehouse within the meaning of Rule 2(vii) of the Excise Rules 2005 and said warehouse is a State Government establishment, established and controlled by the Excise Commissioner . It would be relevant to reproduce Rule 6DD(b) of the IT Rules at this juncture :-

(b) where the payment is made to the Government and, under the rules framed by it, such payment is required to be made in legal tender.

In the instant case, the assessee (retail vendor) had made cash payments for purchase of country spirit by depositing cash directly into the bank account of M/s ABPL as per Rule 6(2) of the Excise Rules 2005 , it has to be construed as payment made to the State Government authority and accordingly falls under the exception provided in Rule 6DD(b) of the IT Rules.

22. It is not in dispute that M/s Asansol Bottling & Packaging Co. Pvt Ltd have been granted licence to act as a wholesaler for supply of country liquor to the retail vendor as per the regulations of the Excise Department , Government of West Bengal. At the cost of repetition, we would like to state that the said regulation mandated the payments to be made directly into the bank account of the said wholesale licensee by the retail vendor (i.e assessee herein) for strict and effective regulation of the country liquor and for prevention of spurious stocks and black marketing transactions from the same. Hence it could be safely concluded that the said wholesale licensee had acted at the instance of the State Government. Once this is so, then the said wholesale licensee could be construed as an agent of the State Government. For the sake of convenience, the relevant rule is reproduced hereunder:-

Rule 6DD(k) – where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person.

The payment made by the assessee retail vendor to the Principal, Government of West Bengal through its wholesale agent. The relationship between the assessee (authorized retailer) and Government of West Bengal (the supplier) acting under West Bengal Excise Rules through its Authorised Wholesaler Licensee (Agent), both defacto and dejure , is one of 'Principal' and 'Agent'. We hold that the assessee retail vendor had made payment to the said agent (whole sale licensee) would fall under the exception provided in Rule 6DD(k) of the Rules.

23. *The ld AR had advanced another argument that the payment is made by the assessee to State Bank of India and accordingly the same would fall under the exception provided in Rule 6DD(a) of the Rules. We find that the assessee had made payments only to the customer of State Bank of India and not to State Bank of India. Hence the assessee's case does not fall under the exception provided in Rule 6DD(a) of the Rules.*

24. *We hold from the aforesaid findings that the assessee's case falls under the exceptions provided in Rule 6DD(b) and Rule 6DD(k) of the Rules. In view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we have no hesitation in deleting the disallowance made u/s 40A(3) of the Act in all the years under appeal. Accordingly, the grounds raised by the assessee for all the years under appeal are allowed.*

5. The facts and circumstances and relevant provision of income tax applicable in the present case are identical to the facts and provisions of law referred to in the decision rendered in the aforesaid case. Respectfully following the decision referred to above, we hold that disallowance u/s 40A(3) of the Act cannot be sustained and the same is directed to be deleted.

6. In the result the appeal by the assessee is allowed.

Order pronounced in the Court on 02.09.2016.

Sd/-
[Dr.Arjun Lal Saini]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 02.09.2016.
[RG PS]

Copy of the order forwarded to:

1. Motor Ch. Mondal, Sahid Khudi Ram Sarani ,
Neamatpur, P.O.Sitarampur-713359
2. I.T.O., Ward-2(2), Asansol.
3. CIT(A)-Asansol
4. CIT-Asansol.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches