

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH öCö, KOLKATA  
[Before Shri Mahavir Singh, JM & Shri M.Balaganesh, AM]

**ITA No.726/Kol/2011**  
Assessment Year : **2005-06**

(APPELLANT )  
Aloke Kumar Sarkar  
Hooghly  
(PAN:AKKPS 9552 R)

-versus-

(RESPONDENT)  
I.T.O., Ward-2(3)  
Hooghly

For the Appellant : Shri Somnath Ghosh, Advocate  
For the Respondent : Shri P.K.Chakraborty, Addl.CIT

Date of Hearing : 15.09.2015.  
Date of Pronouncement : 18.09.2015.

**ORDER**

**Per Shri M.Balaganesh, AM**

1. This appeal of the assessee arises out of the order of the Learned CITA in Appeal No.177/CIT(A)-XXXVI/Kol/Wd-2(3),Hooghly/07-08 dated 07.03.2011 for the Asst Year 2005-06 arising out of the order of the Learned Assessing officer framed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the ÆActö).

2. The only issue to be decided in this appeal is as to whether the Learned CITA is justified in confirming the addition made in the sum of Rs 1,10,000/- towards disallowance of expenses u/s 40A(3) of the Act.

3. The brief facts of this issue is that the assessee is an individual carrying on business as contractor for supply of fly ash to RBM ó PATI joint venture and is also deriving income from retail outlet of ration items under the Public Distribution System. During the assessment year under appeal, the assessee made payments to four parties by bearer cheques for supply of fly ash to the following persons:-

Shri.Ratan Ghosh on 4.2.2005	1,00,000
Shri.A.Alam on 30.3.2005	1,30,000
Shri.Chand Mohammed on 30.3.2005	1,70,000
Shri.Sambhu Sikdar on 30.3.2005	<u>1,50,000</u>
	5,50,000

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The Learned AO invoked the provisions of section 40A(3) of the Act and disallowed 20% of Rs. 5,50,000/- amounting to Rs. 1,10,000/- as the payments were made otherwise than by way of crossed or account payee cheque which was also upheld by the Learned CITA. Aggrieved, the assessee is in appeal before us by raising three grounds.

4. Shri.Somnath Ghosh, Advocate, the Learned AR argued on behalf of the assessee and Shri. P.K.Chakraborty, Additional CIT, the Learned DR argued on behalf of the revenue.

5. The Learned AR argued that the four parties viz Shri.Ratan Ghosh ; Shri.A.Alam ; Shri.Chand Mohammed and Shri.Sambhu Sikdar form the local syndicate for supply of fly ash who in turn procure the same from various Thermal Power plants . In other words, the fly ash generated by the thermal power plants are procured by these four persons and they in turn supply the same to the assessee. Hence he argued that the assessee had to obey the dictates of these four persons as far as the mode of payment is concerned. He further argued that except Shri. Ratan Ghosh, the other three parties are not having any bank account and hence assessee had no other option but to make payments only in bearer cheques or in cash. He argued that the genuineness of the payments had not been doubted by the revenue. He also argued that except the payment of Rs. 1,00,000/- to Shri.Ratan Ghosh all other payments have been made to him only by account payee cheques. This single transaction in bearer cheque goes to prove the pressing emergency for the assessee to make payment otherwise than by account payee cheque. He further relied on the following decisions in support of his contentions.

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

CIT vs Ashoka Steel Industries & Flour Mills - 293 ITR 192 (P&H)

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In response to this, the Learned DR stated that the affidavit filed by one of the party Shri.Ratan Ghosh that he does not have bank account is patently false as the assessee had payments to him by way of account payee cheques through out the year and only one payment has been made to him by way of bearer cheque. He further pleaded that the assessee's case does not fall under any of the exceptions provided in Rule 6DD of the Income Tax Rules and accordingly, he pleaded for confirmation of the addition made by the Learned AO.

5.1. 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 four parties by bearer cheques who supply fly ash to the assessee. The assessee being a contractor, purchases fly ash from these four parties who had formed a syndicate in procuring the fly ash from various thermal power plants. The assessee in turn supplies the fly ash to RBM-PATI joint venture from whom he had obtained the contract for supply of fly ash. It is observed that the assessee in pursuance of his activities, is duty bound to make payments in cash to these syndicates, had chosen the best alternative method by issuing bearer cheques thereby obtaining the acknowledgement of receipts from the said four parties. It is observed that the assessee in terms of his contract is bound to maintain constant and uninterrupted supplies of fly ash for the purpose of construction of road and also ensure that at no point in time, the contractee be deprived of such material. Apparently, the syndicates insist on cash payments for ensuring continuity and timely supplies. The Learned AR also informed that the syndicates in turn had to make immediate payment to the thermal power plants in cash. We find that the revenue had not doubted the genuineness of the payments made to the aforesaid four parties by the assessee. It is also a fact that the assessee is carrying on his business activities with unorganized sector and payments for purchase of fly ash are to be made to syndicates who act as the agents for thermal power plants. Hence it can also be safely concluded that the relationship of the assessee with these persons is one of principal and agent and as such, the assessee's case falls under the exception provided

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in Rule 6DD(k) of IT Rules. For the sake of convenience, the relevant rule is reproduced here in below:-

*“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. “*

We hold that in view of the fact that relationship of assessee with the parties is that of principal and agent and accordingly payments made thereon would fall under Rule 6DD(k) of IT Rules as stated supra.

It is also observed that the parties except Shri.Ratan Ghosh do not have any bank account and hence obviously the payments could not be made to them in account payee cheque. We hold that since the genuinity of the payments made to the parties are not doubted by the revenue and payments were made to three parties who do not have any bank account, 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 his side to ensure that the payees also don't escape from the ambit of taxation on these receipts by making payment by way of bearer cheques. 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.ö* It is pertinent to place reliance on the decision of the Hon'ble Apex Court in the case of *Attar Singh Gurmukh Singh vs ITO reported in (1991) 191 ITR 667 (SC)* , wherein it was held that :-

*“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*

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*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 Ashoka Steel Industries & Flour Mills reported in (2007) 293 ITR 192 (P&H)*

*“Assessee having made payments in cash for purchase of coal from truck owners as they did not have any bank accounts or the amount was paid after the banking hours, impugned payments were made under special circumstances and there being no dispute regarding genuineness of these transactions , disallowance u/s 40A(3) could not be made.”*

*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 bona fide 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 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 ld.*

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*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.”*

In view of the aforesaid facts and circumstances and the judicial precedents relied upon, we have no hesitation in deleting the addition made in the sum of Rs. 1,10,000/- u/s 40A(3) of the Act.

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

**Order pronounced in the court on 18.09.2015.**

Sd/-  
[Mahavir Singh]  
Judicial Member

Sd/-  
[M.Balaganesh]  
Accountant Member

Date: 18.09.2015.  
R.G.(.P.S.)

Copy of the order forwarded to:

1. Aloke Kumar Sarkar, Vill.Mandaran, P.O. Itachuna, P.S.Pandua, Dist. Hooghly, Pin:712 105.
2. The I.T.O., Ward-2(3), Hooghly.
3. The CIT-XX, Kolkata,
4. The CIT(A)-XXXVI, Kolkata.
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches