

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

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.391/Kol/2014
Assessment Year :2010-11

Mr. Nirmal Kumar Das W/H/A17, Durgachak Housing Estate, P.O. Durgachak, Hldia, Purba Medinipur, Pin. 721602 [PAN No.ACUPD 7343 M]	V/s.	ACIT, Circle-Haldia, Basudevpur, P.O. Khanjan Chak, Haldia, Purba Medinipur, Pin – 721602
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Mihher Bandhopadhy, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Arjan Prasad Roy, JCIT-DR
सुनवाई की तारीख/Date of Hearing	12-11-2015
घोषणा की तारीख/Date of Pronouncement	11-12-2015

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-XXXIII, Kolkata in appeal No.96/CIT(A)-XXXIII/ACIT, Cir. Haldia/13-14 dated 22.01.2014. Assessment was framed by ACIT, Circle-Haldia u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 18.03.2013 for assessment year 2010-11.

2. Only issue raised by assessee in this case is that Ld. CIT(A) erred in confirming the addition of ₹29,42,357/- by invoking the provision of Sec. 40A(3) of the Act.

3. Briefly stated facts are that assessee is an individual engaged in business of civil construction and labour supply under the name & style of Das Development Construction. During the year under consideration, assessee has made cash payment to his permanent employees for more than ₹20,000/- in a day. The assessee explained the reason to the AO during assessment proceedings that there was a labour dispute and political pressure for making such payment. Therefore, assessee had no option except to make the payment in cash. However, AO disregarded the claim of assessee and disallowed a sum of ₹29,42,357/- u/s 40A(3) of the Act and added it to the income of assessee.

4. Aggrieved, assessee preferred appeal before Ld. CIT(A) who upheld the action of Assessing Officer by observing as under:-

"I have considered the facts of the case and the appellant's submission. The appellant has not denied that the payments were made to the workers otherwise than by account payee cheques. As per the provisions of section 40A(3), such payments are not allowed as deductions. Rule 6DD provides the list of cases and circumstances in which a payment in aggregate exceeding twenty thousand rupees to a person in a day otherwise than by an account payee cheque drawn on a bank or by an account payee bank draft. The nature of arrear wage payments made by the appellant to the labours are not covered in such cases and circumstances. The list provided under Rule 6DD is exhaustive and not inclusive. The Hon'ble Calcutta High Court in the case of Bagmari Tea Co Ltd. Vs Commissioner of Income-tax (2002) 121 taxmann. 143 (Cal) after referring to the case of Girdhari Lal Goenka Vs CIT (1989) 179 ITR 122 (Cal) held as under:-

'With respect we are of the view that when the payment is made in contravention of section 40A(3) though the payment is genuine, that cannot be allowed, because the genuineness of payment is required in all cases but payment by account payee cheque or demand draft is additional requirement under section 40A(3)). If we follow the view that the payment is genuine, then that should not be disallowed. In that case the provision of section 40A(3) will become redundant. Therefore, unless there are unavoidable circumstances for payment in cash, that payment will be hit by the provision of section 40A(3). The finding of the Assessing Officer and the Commissioner (Appeals) as well as the Tribunal was that there were no unavoidable circumstances for payment by cheque

or bank draft. When there were no compelling circumstances or the assessee was not compelled to make payment in cash, in such circumstances we find no infirmity in the order of the Tribunal.

Thus, the Hon'ble Calcutta High Court has clearly held that the provisions of section 40(3) would become redundant if all genuine payments were taken out of the purview of the requirements of Section 40A(3). Therefore, according to the Hon'ble High Court the payments would be hit by the provisions of section 40A(3) unless there are unavoidable circumstances for payment in cash. The case laws relied upon by the appellant were in the context of the erstwhile Rule 6DD which read as under:-

'(j) in any other case, where the assessee satisfies the Income-tax Officer that the payment could not be made by a crossed cheque drawn on a bank or by a crossed bank draft

- (1) Due to exceptional or unavoidable circumstances, or*
- (2) Because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof and also furnishes evidence to the satisfaction of the Income-tax Officer as to the genuineness of the payment and the identity of the payee.*

This Rule is no longer available in the rule book. In a decision in the case of Pranaj Kr. Moulik Vs Income-tax Officer Wd 41(3) Kolkata (2011) 11 Taxmann.com 401(Kol), the Hon'ble ITAT Kolkata Bench C held that genuine and bona fide payments cannot be taken out of the purview of section 40A(3) of the Act after amendment of the rules by the Finance Act 1995, which was clarified vide Board's Circular no. 117 dated 14.08.1995. In that case the assessment year concerned was 2004-05 and cash payments made to BPL were disallowed as the appellant could not bring his case under any of the clauses or the residuary clause of the rules. In view of this legal position, the appellant cannot now take the cover of unavoidable and exceptional circumstances which is no longer provided under Rule 6DD. Be that as it may, what, at best, now needs to be examined is whether the appellant was compelled by any compelling circumstances to contravene the provisions of section 40A(3) of the Income-tax Act, 1961. The arrear wage payments were made in view of the so called bipartite settlement dated 24.11.2009 entered into before the Additional Labour Commissioner, West Bengal. The appellant has furnished a

copy of the memorandum of settlement. This memorandum of settlement was entered into between the contractors engaged but M/s. Haldia Petrochemicals Ltd. at their plant at Haldia (including the appellant) and their workman represented by Haldia Petrochemicals Ltd. Servicing and maintenance Contractors Union (Regn. No. 23667). Names of 40 contractors have been listed in the memorandum of settlement as parties to the settlement. The memorandum of settlement has been witnessed by the representatives of Haldia Petrochemicals Ltd. (Principal Employer) and has been entered into before the Conciliation Officer and Additional Labour Commissioner, West Bengal. Thus, it is not a mere bipartite agreement. This settlement nowhere provides that the wages have to be paid in cash. The appellant has also furnished a copy of letter dated 14.01.2010 (in Bengali) purportedly returned by the General Secretary of the Workers Union to the appellant requesting that the payments be made in cash since the labourers do not have bank account with the warning that the appellant's business could face problems if request was not heeded to. The appellant has not explained as to how this request letter could override the elaborate memorandum of settlement entered into by various contractors with the worker's union as ratified by the Additional Labour Commissioner. It is difficult to understand as to how the appellant was pressurized only by this letter to make the payment in cash in contravention of the law of the land when an elaborate procedure of arriving at a uniform multi party settlement was followed simply for agreeing upon the nature and amount of dues payable to the workers. It is also not the case of the appellant that all the workers were not having bank accounts and it has not been established during the assessment proceedings or the appellate that the appellant or the workers were not covered by banking facilities. Hence, I hold that the appellant was not compelled by any unavoidable circumstances to make the payments to the workers otherwise than by a account payee cheques. The appellant has not been able to show that his case is covered any of cases and circumstances listed under Rule 6DD. Hence it is held that the Assessing Officer correctly disallowed the total cash payments of Rs.2942357/- under section 40A(3) of the Income-tax Act, 1961. The addition is **confirmed.**"

Being aggrieved by this order of Ld. CIT(A) assessee preferred second appeal before us on the following grounds of appeal.

"1. That on facts and circumstances of the case the Ld. CIT(Appeals) was not justified to confirm the addition amounting to Rs.29,42,357/- by invoking section 40A(3) of the I.T Act 1961 without considering the written submission made before him.
For the end of justice the addition of Rs.29,42,357/- should be deleted."

Shri Miher Bandhopadhay, Ld. Authorized Representative appearing on behalf of assessee and Shri Anjan Prasad Ray, Ld. Departmental Representative appearing on behalf of Revenue.

5. We have heard rival contentions of both the parties and perused the materials available on record. Ld. AR submitted paper book running in pages from 1 to 82 and contented that there was a bi-partite settlement on dated 24-11-2009 with the labour for the arrear payment of wages in the presence of Additional Labour Commissioner, West Bengal. When the assessee decided to pay the arrear of wages by account payee cheques then workers raised hue and cry and denied to accept account payee cheques. The Id. AR also submitted that most of the labours were poor and had no bank account. The labours started creating the hindrance in the work of the assessee. The union leader of the labours stated in writing to pay the arrear of wages in cash otherwise the hindrances in the work shall continue. The situation for the assessee was beyond control to handle the business so he finally issued bearer cheques in the name of the respective labour for the payment of wages. The assessee was forced to issue bearer cheque in lieu of account payee cheque due to abnormal and unavoidable circumstances. The Id. AR further submitted that the exception provided in rule 6DD is not exhaustive and it was the need of the situation for the purpose of business expediency to make the payment in cash. Finally the Id. AR prayed for the allowance of the expenses. The Ld. DR on the other hand vehemently relied on the orders of authorities below.

5.1 From the aforesaid discussion, the gist of the case is that the AO disallowed the expenses for the payment of arrear of wages in cash by invoking the provision of section 40A(3) of the Act. Though the Id. AR submitted that the payment was made under unavoidable circumstances and such situation is covered for the payment in cash in the exception provided in rule 6DD of Income Tax Rules 1962. However we find that there is no such

exception in rule 6DD for allowing the payment in cash in the circumstances discussed above. We find the from the assessment year 2009-10, the earlier ceiling of Rs. 20000.00 for cash payment per transaction has been amended. Now the ceiling of Rs. 20000.00 will be aggregate in one day of all such transactions. The list provided under rule 6DD is exhaustive and not inclusive. However, we also find from the order of lower authorities that genuineness of expenses has not been doubted. Therefore in our view, the provisions of section 40A(3) could not be made applicable to the facts of the instant case because it is observed that the assessee had taken 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 bearer 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 06.07.1968** 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."*

5.2 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.”

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 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 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.

5.3 It is pertinent to notice that the primary object of enacting section 40A(3) was two folds, 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 labours were paid by the bearer cheque only in their respective name only.

5.4. *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 Hon'ble 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 issued bearer cheques in the name of respective labours which is evident from the additional details submitted by the assessee and placed on page 2 to 6 of the additional details. 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.

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. 29,42,357/- u/s 40A(3) of the Act. Accordingly, this ground of the assessee is allowed.

6. In the result, assessee's appeal is allowed.

Order pronounced in the open court 11/12/2015

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 11/12/2015 कोलकाता ।

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

1. अपीलार्थी/Appellant-Mr. Nirmal Kr. Das, W/H/A17, Durgachak Housing Estate
P.O. Durgachak, Haldia, purba Medinipur, Pin 721602
2. प्रत्यर्थी/Respondent-ACIT, Cir.Haldia, Basudevpur, P.O. Khanjan Chak, Haldia,
Purba Medinipur, Pin 721 602
3. संबंधित आयकर आयुक्त / Concerned CIT Haldia
4. आयकर आयुक्त- अपील / CIT (A) Haldia
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,
/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।