

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'B', BENGALURU

BEFORE SHRI. INTURI RAMA RAO, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL, JUDICIAL MEMBER

I.T.A No.1237/Bang/2013
(Assessment Year : 2009-10)

Shri. Sharanappa S. Alur,
K. K. Colony, Jalanagar,
Bijapur - 586 101 .. Appellant
PAN : ABKPA2058H

v.

Joint Commissioner of Income-tax,
Bijapur Range, Bijapur .. Respondent

Assessee by : Shri. Narendra Sharma, Advocate
Revenue by : Shri. G. Kamaladar, Standing Counsel

Heard on : 18.04.2017
Pronounced on : 09.06.2017

ORDER

PER LALIT KUMAR, JUDICIAL MEMBER:

This appeal by the assessee is filed against the order of the CIT (A),
Belgaum, dt.15.04.2013, for the assessment year 2009-10.

02. The assessee has raised the following grounds of appeal before us :

1. The order of the Authorities below in so far as it is against the Appellant is opposed to law, equity, weight of evidence, probabilities and the facts and circumstances in the Appellant's case.
2. The appellant denies himself liable to be assessed over and above the income reported of Rs. 1,18,98,890/- by the appellant under the facts and circumstances of the case.
3. The learned authorities below are not justified in law in disallowing a sum of Rs. 1,57,44,357/- as disallowance under section 40A(3) of the Act under the facts and circumstances of the case.
4. The learned authorities below failed to appreciate business expediency and other relevant factors of the trade and business under the facts and circumstances of the case.
5. The learned authorities below failed to appreciate the fact that the appellant had made the payments to the parties on holidays amounting to Rs. 29,38,968/- and hence disallowance under section 40A(3) of the Act was not justified under the facts and circumstances of the case.
6. Without prejudice the learned authorities below failed to appreciate the fact that the appellant if at all any disallowance is to be made under section 40A[3] of the act then after allowing the basic exemption of Rs. 20,000/- on payments the balance amounts alone could have been considered for the purposes of disallowance under section 40A(3) of the Act under the facts and circumstances of the case.
7. The Appellant denies himself liable to be charged to interest under section 234A, 234B & 234C of the Income-Tax Act, 1961, under the facts and circumstances of the case.

03. Ground no1, has not been pressed by the assessee and is therefore dismissed as not pressed. We shall be deciding all the remaining issues collectively as they interrelated and interdependent.

The assessee is a civil contractor carrying on civil construction work for the Government Departments within the state of Karnataka. He filed his return of income declaring a total income of Rs.1,18,98,890/-. The case was selected for scrutiny assessment. During the assessment proceedings, the AO noticed that the assessee has incurred huge expenses in cash for the payment or an aggregate payment made to one party in a day which exceeded Rs.20,000/-. Thus it was in violation of Section 40A(3) of the Act, and therefore, gave a notice mentioning the following :

S. No.	Name of party	Amount disallowable u/s.40A(3)
1	M/s. Sujal Traders (purchase of cement)	Rs. 77,23,933
2	M/s. Sangam Sales Corporation (purchase of cement)	Rs. 36,79,555
3	M/s. Patil Petroleum (petrol purchase)	Rs. 14,80,000
4	Others (cement, petrol, RD materials etc)	Rs. 28,60,869
	Total	Rs.1,57,44,357

In response to the notice, assessee filed a reply and submitted as under :

"2. As regards cash payments exceeding Rs.20,000/- made to various parties mentioned in the above letter, I submit that I had undertaken contract work in different places during the year and I alone cannot supervise the work carried on in different places. Hence, I had to make one person responsible for the execution of the work and I had also authorised him to make purchases of materials in case of emergency. Accordingly, the persons so authorised made purchases of cement and other materials as and when required and the payments were made in cash. The expenses so incurred were during the course of business and this was a bonafide mistake in complying with the provisions of the Income Tax Act. It may not be out of place to submit that the net profit declared works out to 6.03% which is quite reasonable in this line of business. I therefore, request your honour kindly to take a lenient view and drop the addition proposed to be made in this regard."

The AO was not satisfied with the explanation given by the assessee and has, therefore, disallowed an amount of Rs.1,57,44,357/- u/s.40A(3) of the Act. Being aggrieved by the order passed by the AO, the assessee filed an appeal before the CIT (A).

04. The CIT (A) vide order dt.15.03.2013, dismissed the appeal of the assessee and confirmed the disallowance of Rs.1,57,44,357/- made by the AO. Being aggrieved by the order passed by the CIT (A), assessee is in appeal before us, on the grounds stated herein above.

05. Before us, the Ld. AR submitted that the assessee is a civil contractor carrying on civil works for Public Works Department and the activities of the assessee are confined to various parts of Bijapur district, Karnataka .

He submitted that the detailed submissions were filed by the assessee in the paper book from pages 18 to 33 showing that the purchases were made for raw-material and consumables in the normal course of business. The Ld. AR further submitted that the said submissions were made before the lower authorities also and that the CIT (A), however Ld CIT (A) without calling for the remand report from the AO in respect of the submissions made before him (paper book pages 18 to 64), has dismissed the appeal of the assessee. It was also submitted that the authorities below have failed to appreciate the business exigencies and other relevant factors of the trade of the assessee. It was further submitted that the assessee is in the business of construction of road, bridge and civil contract for PWD, on account of business exigencies, expediency and practical necessities, it was incumbent upon the assessee to make several payments to the vendors for purchase of cement, refilling of diesel in the vehicles, for which cash payment was required to be made. It was also submitted that the case of the assessee comes within the scope of commercial expediency under Rule 6DD of IT Rules. The Assessee has submitted that he has undertaken ten civil contracts as under, during the year under consideration:

1. Almatti to Bagalkot – construction of roads and bridges;
2. Reliance Tower Projects ;
3. Gulbarga Development Authority – Development of sites ;
4. KNNL Dharwad – construction of roads and bridges ;
5. NH Division Bijapur – construction of roads and bridges ;
6. PRE Division Bijapur – construction of roads and bridges ;
7. PMGSY formation of roads in and around Muddebihal and Indi taluks ;
8. PRE Division Bagalkot – Construction of roads and bridges ;
9. Project work in Bijapur division – construction of roads and bridges ;
- 10.PWP & WT Bagalkot Division – construction of roads and bridges.

It was further submitted that the assessee has under taken the projects at locations outside the place where he is stationed, therefore, cash payments were made for the purchase of cement, diesel, etc., It was further submitted that the AO has not disputed the genuineness of the payments but has only disallowed the deduction u/s.40A(3) as the payment made in cash in one day was exceeding Rs.20,000/- to one person. It was submitted that the AO was not justified in disallowing the entire cash payments made by the assessee. During the course of argument, the assessee drawn our attention to the tabulated statements placed at pages 34 to 64 of the paper book to show that in various cases the cash payments were made on weekly off, Sundays and Gazetted holidays. It was submitted that these payments were even otherwise required to be allowed being made on weekly off, Sundays and Gazetted holidays.

06. The Ld. AR relied upon the judgment of the Bengaluru Tribunal in the case of M/s. Ranka & Ranka v. JCIT [ITA No.578/Bang/2002, dt.04.07.2005] and has requested that the order passed by the lower authorities is required to be set aside. The Ld AR relied upon the judgment of Hon'ble Allahabad High Court in the case of CIT v. Chaudhary & Co [(1996) 217 ITR 431] and also on the judgment of Hon'ble jurisdictional High Court in the matter of ACIT v. Sri Saraswati Iron Foundry [(2006) 287 ITR 313].

07. In the alternative, it was submitted that an amount of Rs.29,38,968/- is required to be allowed being the amount paid on holidays in view of Rule 6DD of the IT Rules r.w.section 40A(3) of the Act.

08. On the other hand, the Ld. DR has drawn our attention to Rule 6DD of the IT Rules to show that the case of the assessee is not covered by any of the exceptions mentioned in Rule 6DD and has submitted that the appeal of the assessee requires to be dismissed.

09. We have gone through the record, paper book, written submissions and considered the arguments addressed by the respective parties. It is an admitted position as discernible from the order passed by the AO that the amount of Rs.77,23,933/- was paid to M/s. Sujal Traders for purchase of

cement, a sum of Rs.36,79,555/- was also paid to M/s. Sangam Sales Corporation for purchase of cement and the sum of Rs.14,80,000/- was paid to M/s. Patil Petroleum for purchase of petrol. Rs.28,60,869/- was spent for purchase of cement, petrol etc., Thus, in our opinion, the AO has not disputed either the genuineness of the transaction or has not disputed the person to whom payment in cash was made by the assessee. The AO has only disallowed the deduction in view of Section 40A(3) of the Act Rule 6DD of the IT Rules. In our view, once the AO has not disputed the identity of the person to whom the payment was made and has also not disputed the business exigency, the disallowances made by the AO is not sustainable in the eyes of law. In the identical facts and circumstances of the case, Hon'ble Delhi High Court in the matter of Honey Enterprises v. CIT [ITA.163/2002, dt.08.12.2015, in para 26 to 37, held as under :

26. The Revenue did not accept the CIT(A)'s decision and preferred appeals before the ITAT. The ITAT did not accept the view that the payments in question were outside the scope of [Section 40A\(3\)](#) of the Act; however, the ITAT accepted the contention that such payments had been made on account of exigencies of business. The ITAT further observed that the rigours of [Section 40A\(3\)](#) of the Act had been relaxed by virtue of Rule 6DD of the Rules as well as CBDT Circular No. 220 dated 31 st May, 1977 and the instances indicated in the circular were not exhaustive.

27. The learned counsel appearing for the Revenue submitted that although the identity of the recipients of cash payments as well as genuineness of the transactions was not disputed, the Assessee had failed

to establish exceptional or unavoidable circumstances, which compelled the Assessee to make such payments in cash. He submitted that in the absence of establishing extraordinary circumstances, the payments made in cash were liable to be added to the income of the Assessee by virtue of [Section 40A\(3\)](#) of the Act.

28. Countering the submissions made on behalf of the Revenue, Ms Kapila submitted that not only the genuineness of the transactions had been established but the ITAT had also accepted, as a fact, that such payments were necessary in the course of conducting business. She also contended that it was necessary to look at the circumstances under which payments had been made and by keeping in view of the commercial constraints and the practicality of the circumstances which had to be dealt with by the Assessee as a businessman. She emphasised that the Assessee had made payments in cash keeping in mind the commercial necessity and the practicality of the business.

29. Before considering the rival contentions, it is necessary to observe (i) that there is no dispute as to the identity of the producers to whom cash payments have been made by the Assessee; and (ii) that the payments were made bonafide and in consideration of a genuine transactions as advances either for processing the positives of the film or acquiring the rights of exhibition of feature films. Thus, indisputably, such payments were allowable as deduction being revenue expenses incurred wholly and exclusively for business. The only issue to be considered is whether the same have to be disallowed by virtue of [Section 40A\(3\)](#) of the Act because the same were made in cash.

30. [Section 40A\(3\)](#) of the Act as in force during the AYs 1992-93 and 1993-94 reads as under:-

"(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, such expenditure shall not be allowed as a deduction: Provided that where an allowance has been made in the assessment for any year not being an assessment year commencing prior to the 1st day of April, 1969, in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year the assessee makes any payment in respect thereof in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank

or by a crossed bank draft, the allowance originally made shall be deemed to have been wrongly made and the Assessing Officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment, and the provisions of [section 154](#) shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the assessment year next following the previous year in which the payment was so made:

Provided further that no disallowance under this sub-section shall be made where any payment in a sum exceeding ten thousand rupees is made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors."

31. Rule 6DD of the Rules expressly provides that no disallowance under Sub-section 3 of Section 40A shall be made, inter alia, in circumstances specified thereunder. Clause (j) of Rule 6DD of the Rules (as applicable during the relevant assessment years) expressly provided that no disallowance under [Section 40A\(3\)](#) of the Act would be made in cases where the Assessee furnishes evidence to the satisfaction of the Income-tax Officer as to the genuineness of the payment and the identity of the payee. And, the Assessee further satisfies the Income-tax Officer that payment could not be made by crossed cheque drawn on a bank or by a crossed bank draft "(a) due to exceptional or unavoidable circumstances; or (b) because payments in the manner aforesaid was not practicable, or would have cause genuine difficulty to the payee, having regard to the nature of transaction and the necessity for expeditious settlement thereof."

32. Apparently, several representations were received by the CBDT regarding difficulties that were being faced by tax payers due to the lack of uniformity in the interpretation of the aforesaid Rule. In the circumstances, the CBDT issued a circular - being Circular No. 220 dated 31st May, 1977, inter alia, providing as under:-

"4. All the circumstances in which the conditions laid down in rule would be applicable cannot be spelt out. However, some of them which would seem to meet the requirements of the said rule are ;

- (i) The purchaser is new to the seller ; or
- (ii) The transactions are made at a place where either the purchaser or the seller does not have a bank account; or
- (iii) The transactions and payments are made on a bank holiday ; or (iv) The seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non- availability of goods otherwise than from this particular seller ; or
- (v) The seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchased the goods; or
- (vi) Specific discount is given by the seller for payment to be made by way of cash."

33. CBDT further clarified that "the above circumstances are not exhaustive but illustrative. There could be cases other than those falling within the above categories which would also meet the requirements of rule"

34. The ITAT had considered the above mentioned CBDT Circular and had rightly concluded that the circumstances as spelt out in CBDT Circular No. 220 (supra) were not exhaustive but were merely illustrative of situations where business exigencies required that the payments be made in cash. The ITAT also referred to the decision of the Gujarat High Court in [Hasanand Pinjomal v. CIT](#): (1978) 112 ITR 134 (Guj.) wherein the Court had observed that the practicability would have to be judged from the angle of a businessmen and not the Revenue.

35. In the present circumstances neither the genuineness of the payment nor the identity of the payee is disputed. The only controversy that needs to be addressed is whether the ITAT's decision that such payments had been made by the Assessee on account of business exigencies is perverse.

36. In the present case, the AO does not dispute that the Assessee carried on its business in Delhi and its officers had to travel to Bombay to negotiate the purchase of distribution rights. The Assessee had also contended that such payments were made as the producers required the payments urgently at various sites where films being produced by them were being shot and it was expected that such payments be made in cash in the normal course of conducting business.

37. In our view, the question whether the Assessee's business exigencies required payments to be made in cash, is a question of fact. The ITAT

has returned a finding in favour of the Assessee and it is not possible to conclude that such finding is without any basis or any material on record. The ITAT's decision, thus, cannot be held to be perverse. Accordingly, the question of law is answered in favour of the Assessee and against the Revenue.

10. In the light of the above, we therefore, deem it appropriate to remand back the matter to the file of the CIT (A) to decide the issues 2-6 in the present appeal afresh, considering the judgment of the Hon'ble Delhi High Court referred to herein above, after seeking remand report from the AO on the documents forming part of the paper book, from pages 34 to 64 , so as to examine the business exigency. If on examining the documents and after seeking the remand report from the assessing officer, the authorities comes to the conclusion that there was business exigencies for making the payment in cash then the authority shall allow the deduction of such payment. The CIT(A) is also directed to examine the claim of the assessee in respect of a cash payment made on holidays for an amount of Rs.29,38,968/-. in terms of Rule 6 DD of Income Tax Rules. If the Ld CIT(A) comes to the conclusion that the payment in cash was made on the holidays and there was a urgency and requirement of business then the deduction of payment made on the holidays shall be allowed by him .

11. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 9th day of June, 2017.

Sd/-

Sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

(LALIT KUMAR)
JUDICIAL MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar