

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'SMC' BENCH,
NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No. 6609/DEL/2016 [A.Y. 2011-12]

Shri Mool Chand Yadav
C/o Shri Kapil Goel, Adv
F-26/124, Sector 7, Rohini
Delhi 110 085

Vs.

The D.C.I.T.
Ghaziabad

PAN : BJYM 7851 D

[Appellant]

[Respondent]

Date of Hearing : 03.10.2017

Date of Pronouncement : 09.10.2017

Assessee by : Shri Kapil Goel, Adv

Revenue by : Shri T. Vasanthan Sr. DR

ORDER

This appeal of the assessee arises from the order of the ld. CIT(A), Ghaziabad vide order dated 30.11.2016 for assessment year 2011-12.

2. The solitary ground raised by the assessee is against the disallowance of Rs. 12,95,000/- made by assessing officer u/s 40A(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

3. Facts, in brief, as emanating from para two of the order passed by the Id. CIT(A) are that the assessee filed income tax return declaring income of Rs. 12,37,350/- on 2/8/2011 against, which assessment u/s 143 (3) was completed on 06/01/2014 at income of Rs. 1 906050/-. Assessee is engaged in housing construction activity under the name and style of M/s. Maha Lakshmi properties of which assessee is proprietor. Vide order passed u/s 263 of the Act by Id. CIT, Ghaziabad on 04/02/2015 assessment was revised and fresh assessment u/s 263/143(3) which is now impugned was passed on 28/01/2016. In this order, addition of Rs. 12,95,000/- was made by the assessing officer on account of infraction of section 40A(3) of the Act. This addition was challenged by the assessee before the CIT on two grounds, namely, when purchases forms part of closing stock same cannot be subject matter of disallowance and secondly genuine purchases which are fully verifiable and for which no tax evasion is there cannot be disallowed u/s 40A (3) of being the income tax act. At para 5, page 17 the first appellate authority has dismissed both the grounds of the assessee. According to the first appellate authority as stated in para 5.2.1 at same page “the law does not distinguish whether such an expenditure has materialised in sale of products or becomes a part of current asset under the closing stock”, thus

reasoning, the appellant's contention that properties purchased through cash payments are reflected in stock and trade does not avert implications of section 40A(3) of the Act was held by her. Qua genuineness of the purchases the first appellate authority has not stated much. Further written submissions of the assessee are reproduced by the first appellate authority in paragraph 4 from pages 3 to 16 of her order. Aggrieved by the order of the ld. CIT(A), the present appeal is filed before this Tribunal challenging the invocation of section 40A(3) of the Act.

4. The assessee has filed paper book running into 91 pages which is on record.

5. I have heard both the sides and perused the relevant material on record. Ld. counsel of the assessee Sh. Goel has vehemently argued that both the lower authorities have incorrectly confirmed the applicability of section 40A(3) in present facts. Ld Counsel has pleaded that factum of purchases being genuine is not called in question by any of the authorities below. Ld Counsel has pleaded that fact of subject purchases being forming part of closing stock is also not in dispute. From the pleadings made before lower authorities, Ld Counsel has

emphasized that once purchases are not claimed as expenditure in period under consideration question of disallowance under any provision including section 40A(3) cannot arise at all as same are admittedly part of closing stock. Further Id Counsel has argued before me that Kolkata bench of ITAT decision in case of Prabir Mullick vide order dated 01/06/2016 enclosed in paper book at pages 49 to 63 has at Para 11.1/page 60 of the paper book, clearly held that object of section 40A(3) as per circular No. 6P/1968 was “this provision is designed to counter evasion of tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the Department as to identity of the payee and reasonableness of repayment”, after considering all the relevant decisions on the subject the tribunal in said order in concluding paragraph No. 11.3/page 62 of paper book has held that “it is pertinent to note that primary object of enacting 40A(3) were two folds, firstly putting a check on trading transactions with a mind to evade the liability to tax on income earned out of such transactions, and secondly, to inculcate the banking habits among the business community. Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, consequence which were to be fallen on account of non observance of

section 40A(3) must have nexus to be failure of the object. Therefore, the genuineness of transaction being free from vice of any device of evasion of tax is relevant consideration...” Relying on these observations, Ld counsel forcefully argued that present addition is altogether bad as Assessing Officer at page 6/paragraph 5 of his order has clearly observed that “the reply of the assessee that provisions of section 40A(3) would not apply to where stamp duty has been paid and where parties are genuine is not legally correct. The provisions of section 40A(3) read with rule 6 DD as these stand today would apply even when the parties to payments have been made, are genuine and even where source of payments may be explained.” According to the ld. Counsel, these observations of assessing officer as approved by the ld. CIT(A) are plainly incorrect and deserves to be overturned. During the course of arguments ld. counsel for the assessee further relied on recent Delhi bench of tribunal decision in case of Marie Gold Ltd order dated 11/09/2017 decided in C Bench in ITA No. 5170/Del/2014 for assessment year 2006-2007 where he highlighted the identical facts recorded in paragraph 6 of said order at page 4. In said order this Tribunal, after observing that when identity of the payee, genuineness of transaction and source of payment is established then it is held that section 40A(3) of the Act cannot be applied. In said order, Kolkata

Bench of Tribunal decision in case of Mano Ranjan Raha versus ITO (order dated the 18th Nov. 2015) was relied upon by Delhi bench of Tribunal wherein also Kolkata Tribunal in its decision has observed that object of section 40A (3) of the Act was 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 issuing fictitious or false transaction. Since in present case none of these features are present so according to the Ld. counsel for the assessee the addition made under section 40A(3) of the Act is plainly bad. Relying on this decision, ld counsel for the assessee has prayed for deletion of total addition.

6. Per contra, the ld. DR has pleaded for confirmation of the addition and dismissing for the appeal filed by the assessee. Ld. DR has distinguished the case laws relied by assessee's counsel. Ld DR has pleaded that since assessee has not shown genuine reasons for the payment in cash and has not established commercial expediency, disallowance made by the assessing officer as sustained by 1st appellate authority needs to be confirmed.

7. After careful consideration of the above facts and circumstances of the case and rival contentions, I find force in the arguments of Ld. counsel of the assessee. After attentively going through the decisions relied by the assessee, I find that provisions of section 40A(3) can be invoked only when there is any case of non genuine expenditure/evasive transactions/flow of unaccounted money or where identity of the payee/source of payment/genuineness of transaction are dispute. None of these features are present in extent case. The payment made by the assessee for the subject purchases are in the regular course of business. Further as admitted by the assessing officer in its order genuineness of payment including identity of the payee/source of the payment are not in dispute. Only limited point on basis of which disallowance is made is infraction of section 40A(3) on account of payment being made in mode cash. On basis of this limited count itself, I am of the considered view that present disallowance needs to be deleted. In so holding I find support from the decision by the CBDT Circular 6P/1968 explaining provisions of section 40A(3) of the Act, where objective behind said provision is narrated. The interpretation based on legislative intent is succinctly captured in recent Hon'ble supreme Court decision in case of *Ms. Eera Through Dr. Manjula Krippendorf Versus State (Govt. of NCT of*

Delhi) & Anr In its order dated July 21, 2017 wherein it has been observed as under:

“24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the ‘Lakshman Rekha’ has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon’s case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon’s case.”

8. While so holding the Hon’ble Supreme Court has emphasized that:

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual”. In my view, I’m guided by these words of Hon’ble Supreme Court which are binding under article 141 of Indian Constitution.

9. Further the fact of purchases being part of stock in trade is another reason for which the present disallowance is altogether bad as it is now well settled that to disallow an expenditure it should be first claimed as an expenditure which aspect is admitted by both the lower authorities by clearly observing that subject purchases are forming part of stock in trade. Both the arguments of the assessee are found to be correct and accordingly the solitary addition made amounting to Rs. 12,95,000/- is directed to be deleted.

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

The order is pronounced in the open court on 09.10.2017.

Sd/-

[B.P. JAIN]
ACCOUNTANT MEMBER

Dated: 09th October, 2017

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi