

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

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

I.T.A Nos. 462&463/Kol/2016

Assessment Years : 2011-12 & 2012-13

M/s. Bolkunda Pachwai & C.S.Shop  
Burdwan  
[PAN : AAAAB 2700 K]  
(Appellant)

-vs.-

I.T.O., Ward-1(1)  
Asansol.

(Respondent)

For the Appellant : None

For the Respondent : Shri Arindam Bhattacharjee, Addl.CIT

Date of Hearing : 23.11.2017.

Date of Pronouncement : 29.11.2017.

**ORDER**

**Per N.V.Vasudevan, JM**

These are appeals by the assessee against two orders of CIT-(A)-Asansol both dated 28.01.2016 relating to A.Y.2011-12 and 2012-13.

2. When the appeal was called for hearing none appeared on behalf of the assessee. We however find that the issue raised by the assessee in these appeals which related to addition made to the total income of the assessee by invoking the provision of section 40A(3) of the Income Tax Act, 1961 (Act.) of Rs.85,19,389/- in A.Y.2011-12 and Rs.73,22,442/- in A.Y.2012-13 has already been decided by this Tribunal in the case of several Assessee, who are in the business of retailer of country liquor, such as the Assessee.

3. The Assessee is a firm. It carries on the business of selling country liquor, beer, rum and whiskey. In the business of selling country liquor, the assessee has to purchase country liquor from Asansol Bottling and packaging Pvt. Ltd who are the authorised bottler, permitted to do the work of bottling of country liquor by the Excise Department

in Asansol. The bottling plants will supply country liquor only after payment of the total price of the required bottles of country liquor including (Tax Collection at Source (TCS) in their bank account. The assessee has to furnish the deposit slip to the bottlers and only then they will be permitted to lift the country liquor from the bottling plant. The assessee deposited the amount for lifting bottles of country liquor from the authorized bottler M/S.Asansol Bottling and Packing Pvt.Ltd., Asansol, by depositing cash in the State Bank of India, Asansol in the account of Asansol Bottling and Packing Co.Pvt. Ltd. The AO was of the view that as required by the provision of section 40A(3) of the Act any payment over and above a sum of Rs.20,000/- has to be made only by way of account payee cheque or account payee draft. Any payments made in violation of the aforesaid provision and which are claimed as expenses deductible while computing income from business are liable to be disallowed as expenses while computing income from business of an assessee. The purchase price of country liquor was claimed as an expense by the Assessee in arriving its income from business. The AO was of the view that the expenditure cannot be allowed as there was a violation of the provisions of Sec.40A(3) of the Act. There are exceptions in the provision of section 40A(3) of the Act which are laid down in Rule 6DD of IT Rules, 1962 (Rules). The AO held that none of the exceptions as mentioned in Rule 6DD existed in the case of the Assessee which would justify payment of purchase price of bottlers of liquor in cash and accordingly the AO disallowed a sum of Rs.2,48,09,463/- which was the payments made in cash in violation of the provision of section 40A(3) of the Act. On appeal by the assessee CIT(A) confirmed the order of the AO. Hence this appeal by the assessee before the Tribunal.

4. At the time of hearing of this appeal it was brought to our notice by the Id. Counsel for the assessee that an identical issue was considered and decided by this tribunal in assessee's own case for A.Y.2008-09 in ITA NO.1603/Kol/2011 by its order dated 01.06.2016. In the aforesaid order this Tribunal on identical facts held that the

disallowance u/s 40A(3) of the Act cannot be sustained. The ld. DR however submitted that the ITAT Kolkata Bench in the case of Mohan Lal Chowdhury in ITA No.1964/Kol/2009 order dated 30.04.2010 has taken a view that once the provision of section 40A(3) of the Act are attracted the assessee can escape disallowance only if his case falls within the ambit of Rule 6DD. It was pointed out that in the decision rendered in assessee's own case no such applicability of exceptions prescribed under Rule 6DD has been spelt out. The ld. DR also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs Panduranga Enterprises in ITA No.,752 of 2007 dated 22.09.2014 wherein the Hon'ble Karnataka High Court in the case of an arrack Contractor who made purchase from the Govt. Of Karnataka came to the conclusion that in the case of purchase of country liquor from the State, there was no requirement to pay any such purchase only in cash as per Karnataka Excise Licences (General Conditions) Rules 1967 and therefore the tribunal was in error in deleting the addition made u/s 40A(3) of the Act. The ld. DR also submitted that the exceptions specified under Rule 6DD(b) of the Rules also did not apply because the bottler does or did not insist on payment in cash alone. He also submitted that Rule 6DD (k) is also not applicable because the bottler of the Government cannot be considered as principal of the state.

5. The ld., Counsel for the assessee, on the other hand, however placed reliance on the decision of ITAT, Kolkata in the case of Ramnagar Pachwai & C.S.(S)Shop vs ITO in ITA No.148/Kol/2015 order dated 05.08.2016 wherein the entire issue with regard to the applicability to Rule 6DD(b) and Rule 6DD(k) in the case of purchase of country liquor from the state was discussed and this tribunal ultimately came to the conclusion that exceptions specified in Rule 6DD(v) and Rule 6DD(k) were applicable in the case of purchase of country liquor and no disallowance can be made u/s 40A(3) of the Act.

6. We have given a very careful consideration to the rival submissions. In the case of this tribunal Ramnagar Pachwai & C.S.(S)Shop vs ITO (supra) after analysing the various notifications issued by the Excise department, Government of West Bengal in connection with the country liquor came to the following conclusion :

“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.”

.....

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 20<sup>th</sup> 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 de facto and de jure , is one of ‘Principal’ and ‘Agent’. We hold that the assessee retail vendor had made payment to the said agent (wholesale licensee) would fall under the exception provided in Rule 6DD(k) 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.”*

7. It is no doubt true that to avoid disallowance u/s 40A(3) of the Act the assessee has to make out a case of exception within the parameters of Rule 6DD. It is clear from the

decision of the tribunal rendered in the case of Ramnagar Pachwai & C.S.(S)Shop vs ITO (supra) that in the business of country liquor even when purchases are made from the state, payment in cash for such purchases would be covered within the exceptions under Rule 6DD(b) and Rule 6DD(k). As far as the decision of the Hon'ble Karnataka High Court in the case of Panduranga Enterprises (supra) relied upon by the Id. DR is concerned, that was a case which dealt with the provision of Rule 14 of Karnataka Excise Licence Rules. The decision rendered by the tribunal in the case of Ramnagar Pachwai & C.S.(S)Shop vs ITO (supra) dealt with specific excise rules applicable to the state of West Bengal. We are therefore of the view that the disallowance u/s 40A(3) of the Act has to be deleted as the facts of the assessee's case are identical to the facts of the case decided by the tribunal in the case of Ramnagar Pachwai & C.S.(S)Shop vs ITO (supra). We accordingly direct that the addition made u/s 40A(3) of the Act be deleted. The appeal of the assessee is accordingly allowed.

8. In the result the appeals by the assessee are allowed.

**Order pronounced in the Court on 29.11.2017.**

Sd/-  
[Dr.A.L.Saini]  
Accountant Member

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

Dated : 29.11.2017.

[RG Sr.PS]

Copy of the order forwarded to:

- 1.M/s. Bolkunda Pachwai & (S) CS Shop, P.O.Samadi, Burdwan-713359.
2. I.T.O., Ward-1(1), Asansol.
3. C.I.T. (A)- Asansol.      4. C.I.T- Asansol.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Sr. Private Secretary  
Head of Office/DDO,, ITAT, Kolkata Benches

