

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH; AMRITSAR.**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 566(Asr)/2016
Assessment Year: 2013-14
PAN: ADJPM7623B

Assistant Commissioner of
Income Tax Circle-1,
Jammu.
(Appellant)

Vs. Sh. Darshan Kumar Mahajan,
Prop. M/s R. D. Brothers,
Galla Mandi, Pathankot.
(Respondent)

Appellant by : Sh. A. N. Mishra (D. R.)
Respondent by: Sh. J. S. Bhasin (Adv.)

Date of Hearing: 23.01.2018

Date of Pronouncement: 18.04.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue agitating the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 02.07.2016, partly allowing the Assessee's appeal contesting his assessment u/s. 143(3) of the Income Tax ('the Act' hereinafter) for Assessment Year (AY) 2013-14 by the assessing authority vide order dated 28.03.2016.

2. The principal issue arising in the instant appeal is the sustainability of the disallowance u/s. 40A(3) effected by the Assessing Officer (AO) in assessment, since deleted by the Id. CIT(A). The same has two aspects - one of invocation of section 40A(3) *per se* and, two, the computation of the disallowance there-under.

3. The assessee-individual, engaged in trading of coal, sourced both from within and outside India (under the name and style M/s. R. D. Brothers), was during the course of assessment proceedings observed to have claimed Rs. 1907.96 lacs (in the computation of business income u/s. 28) on account of freight and toll, incurred in cash. On being questioned *qua* the applicability of section 40A(3), reading as under, it was explained by the assessee that there was no violation of section 40A(3) as the payment of road freight - which aggregated to Rs. 661.83 lacs (the balance freight being to Railways, excepted under Rule 6DD of the Income Tax Rules, 1962 - the 'Rules' hereinafter), was staggered over a period of one to five days, so that the payment to each Trucker, i.e., for each consignment, on any single day, did not exceed the prescribed threshold limit of Rs. 35,000:

‘Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect *notwithstanding anything to the contrary* contained in any other provision of this Act relating to the computation of income under the head “Profits and gains of business or profession”.

(2).....

(3) Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, *otherwise than by an account payee cheque drawn on a bank or account payee bank draft*, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

(3A) Where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, *otherwise than by an account payee cheque drawn on a bank or account payee bank draft*, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the

payment or aggregate of payments made to a person in a day, exceeds twenty thousand rupees:

Provided that *no disallowance* shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheques drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, *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:

Provide further that in the case of payment made for plying, hiring or leasing goods carriages, the provisions of sub-sections (3) and (3A) shall have effect as if for the words “twenty thousand rupees,” the words “thirty-five thousand rupees” had been substituted.’

(emphasis, ours)

In fact, the actual payment to the truckers included another Rs. 135.40 lacs on account of toll, which works to 17% of the total payment (to the truckers), being at a total of Rs. 797.23 lacs. As there was no segregation of the amount paid (to a trucker, i.e., as between toll and freight), the toll amount, as per the assessee, was to be considered as comprising 17% of each payment, i.e., as made on any (particular) day. It was not the case, it was further explained by him (in the assessment proceedings), that a truck driver was retained beyond the time taken for the delivery of a consignment, which is to Brick Kiln Owners (BKO), located at varying distances (from the assessee’s location), entailing time, besides the time lost on account of logistic reasons. The same thus consumed from a low of one day (i.e., the same day) to normally three days, stretching to even five days in some cases, over which period the driver is paid in installments, not exceeding Rs. 35,000 per day, by the assessee’s person who normally accompanies the truck to ensure proper delivery of the coal. In other words, the very process of delivery of

goods, which is the assessee's responsibility, takes time, sufficient for the assessee to stagger the payments and, thus, escape the rigor of the provision. It cannot after all be faulted for spreading the cash payments over the time taken to effect delivery, being at the customers' location. That at the assessee's dumps - two in number, and from which supplies are made to parties in the vicinity, are no doubt unloaded invariably on the same day. However, these consignments are small, involving freight component below the threshold limit prescribed by the provision.

In the view of the AO, while the consignments could possibly take up to three days for delivery, that beyond the said period is only with a view to eschew section 40A(3), i.e., does not correspond with the business reality. Accordingly, 'payments' ostensibly made third day onwards were considered as having been made on the third day itself, and exceeding Rs. 35,000, disallowed. Further, the payment on the first day was considered as made, firstly, toward toll, and the balance only toward freight. The payment third day onwards was thus wholly toward freight, as against being at 83 per cent thereof, as contended by the assessee. The disallowance u/s. 40A(3) was effected accordingly. In first appeal, the assessee found favour with the Id. CIT(A) on the basis that section 40A(3) is not absolute in its terms, and that considerations of business expediency and relevant factors are not excluded. It was thus open for the assessee to justify the circumstances under which the payment was not practicable, or would have caused a genuine difficulty to the payee, even as noted by the Hon'ble Apex Court in *Attar Singh Gurmukh Singh* [1991] 191 ITR 677 (SC), to which, as also to the Board Circular No. 220, dated 31.05.1977 (reported at [1977] 108 ITR (St.) 8), reference was made by the Hon'ble jurisdictional High Court in *Gurdas Garg vs. CIT(A)* (in ITA No. 413 of 2014, dated 16.07.2015), holding that where therefore the genuineness of the payment is not in doubt and a case of business expediency

made out, section 40A(3) cannot be invoked. There was no dispute as to the genuineness of the payments as to freight, being to identifiable persons, so that no disallowance u/s. 40A(3) could be made. Reliance was also placed by him on decisions in *Anupam Tele Services* [2014] 366 ITR 122 (Guj) and *Harshila Chordia v. ITO* [2008] 298 ITR 349 (Raj).

4. Before us, both parties relied on the order of the authorities below as favourable to them.

5. We have heard the parties, and perused the material on record.

The impugned order grants relief to the assessee on the ground of inapplicability of section 40A(3) of the Act where the genuineness of the (cash) payment/s is not in doubt or dispute, as in the present case. Equal emphasis stands also placed by the Id. CIT(A) on the genuineness of the relevant expenditure, so that it is both these factors in unison, coupled with the case law, that prevailed with him. We are therefore obliged to consider both these aspects, i.e., the genuineness of the payment - in discharge of the expenditure, as well as of the expenditure itself, being not in dispute, for the validity of the legal inference drawn. We are afraid, we do not find any basis in the clear and ambiguous language of the provision, reproduced supra, for the said construction. On the contrary, section 40A(3) gets attracted - under the circumstances specified therein, only where the genuineness of the expenditure is not in doubt, and the same (expenditure) is therefore otherwise allowable. A non-genuine expenditure would get ousted (for admissibility) at the threshold. This is as it would stand to be disallowed under the relevant section granting deduction itself, as section 37(1) in the instant case, so that there is no occasion to travel to the *non obstante* provision of section 40A(3), which seeks to impose an additional condition *as to the mode of payment* where it

exceeds a specified sum (on a single day) for its allowability. In that sense, it is a fiscal measure intended to discourage payments in cash or, alternatively, encourage transmission of funds having income implication - *one man's expenditure being the other man's income*, through the banking channel. How could then, one may ask, its terms, which are plain, be construed to mean that it bars only non-genuine expenditure, so as to hold that it shall not apply where the genuineness (of the expenditure) is not in doubt. The section, clearly, has nothing direct to do with the genuineness of the expenditure, but is only a fiscal measure regulating the mode of payment (of a genuine expenditure), with the view to facilitate the identification of the money trail and verification of the reporting of income in its respect. A non genuine payment/expenditure, as afore-noted, stands ousted at the threshold, i.e., even otherwise, and without recourse to section 40A(3).

It is then said that the cash payment/s under reference has been accepted as genuine, or its genuineness has not been doubted and, therefore, section 40A(3) cannot hold, little realizing that it is only on that basis, i.e., payment of an otherwise genuine and, thus, allowable expenditure in cash (i.e., other than through the banking channel per the prescribed mode/s) that the disabling provision of section 40A(3) (or section 40A(3A)) gets attracted. It may be noted that it is the complexity as well as the cumbersome nature of the verification, where even the identity of the payee/s tends to get blurred, while a transfer from a bank account to another automatically confirms the identity of the payer and the payee, that has understandably forced the Parliament to provide this legislative measure.

The gate-way stands provided in the form of the prescribed cases and circumstances, per rule 6DD of the Rules, parameters for which, being delegated legislation, viz. consideration of spread of banking facilities; business expediency; and other relevant factors, also stand provided for per the Act itself. Clearly, other relevant factors have to be regarded as those that have a direct bearing on the

ability of a person to pay another per the prescribed mode/s. The terms of the extant provision are not absolute, as was also the case for the assessment years for which the provision was examined by the Hon'ble Apex Court in *Attar Singh Gurmukh Singh* (supra), even as it has undergone several amendments from time to time, even getting *substituted* by Finance Act, 2008 w.e.f. 01/4/2009, with section 40A(3A) (also co-opted along with). A profile of the amendments to the provision, co-opted on the statute by Finance Act, 1968 (w.e.f. 01/4/1968), over time, read along with rule 6DD, as it is to be (refer: *Attar Singh Gurmukh Singh* (supra)), shows a gradual phasing out of the avenues where a breach of the monetary limit imposed (for cash payments, or per other than the prescribed mode/s) was allowed, i.e., the excepting circumstances, in view of the business exigencies; the peculiar practice/s in a particular trade/sector of economy - as agriculture, animal husbandary, etc.; the increasing spread of and accessibility to banking in the economy, et. al. The provision, which initially permitted payments through a negotiable instrument, was in time limited to account payee instrument only, presumably to enable tracking. Responding to a practice of splitting a payment into several (on the same day), each below the prescribed limit, the restriction was amended with reference to the aggregate of payments made during a day. *Expenditure could thus be paid in cash (or other proscribed modes) over several days, i.e., without attracting the provision.* Why, the limit of Rs. 35,000 (per day) for freight payments is itself a departure from the norm of Rs. 20,000 (scaled down to Rs. 10,000 per day from AY 2018-19 onwards), considering the requirement of the trade. Further, all this, again, dispels any doubt, if any, of the provision being applicable only to non-genuine expenditure / payments, a consideration / factor sought to be introduced. Reference in this regard may be made to the decision by the Special Bench of the Tribunal in *ITO v. Kenaram Saha & Subash Saha* [2008]

116 ITD 1 (Kol)(SB), paras 13.3 & 15 of which containing the gist of the decision, we reproduce as under for ready reference:

‘From the plain reading of s. 40A(3) itself it is evident that it would be applicable where the assessee incurs any expenditure exceeding Rs. 20,000 otherwise than by a crossed cheque or by a crossed bank draft. In such circumstances, 20 per cent of such expenditure shall be disallowed. There is no ambiguity in the language of s. 40A(3) and, therefore, the section is to be interpreted by giving literal meaning to the language used in the section itself. In view of the above, the purpose behind the enactment of s. 40A(3) is not relevant. What is relevant is the enactment itself, i.e. s. 40A(3). The IT authorities have to give effect to the section as enacted by the Parliament. Contention that the second proviso to s. 40A(3) is a substantive provision of the law, full effect to which should be given and therefore, even if the facts of the case of an assessee are not squarely covered by any of the clauses of r. 6DD, still the exemption from the rigor of s. 40A(3) can be allowed in view of the provisions of second proviso to s. 40A(3), is not sustainable. It is not possible to agree with the contention of the counsel. The mandate of the second proviso is to exempt the payment in violation of provisions of s. 40A(3) in such cases and under such circumstances as may be prescribed. The last sentence of the proviso, i.e., "having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors", is the guideline for the authority who has to prescribe the cases and circumstances under which the disallowance under s. 40A(3) will not be made despite the payment exceeding Rs. 20,000 other than by crossed cheque/bank draft. In pursuance to this proviso, r. 6DD has been brought into the statute. This rule has been amended from time to time. The assessee will get the exemption from the rigors of s. 40A(3) if he is able to establish that his case falls within any of the cls. (a) to (m) of r. 6DD. Burden would be upon the assessee to establish under which particular clause his case falls.—*CIT vs. Tara Agencies* [2007] 292 ITR 444 (SC) and *CIT vs. Anjum M.H. Ghaswala & Ors.* [2001] 252 ITR 1 (SC) relied on.

Clause (j) of rule 6DD was originally cast in general terms, excepting genuine circumstances warranting payment in other than the prescribed mode. The Apex Court alluded to this rule while upholding the constitutionality of the provision in *Attar Singh Gurmukh Singh* (supra). The Rule has since been amended in wake of the ubiquitous banking, and now reads as under:

‘(j); where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike;’

Section 40A(3) is no doubt open to challenge in view of the provision getting more restrictive. Whether it constitutes more than a reasonable restraint on trade - permissible under Article 19(1)(g) of the Constitution, is for a constitutional Court

to examine and declare in appropriate proceedings before it. Given the constitutionality of the provision, the same has to be read on its terms, even as the explained by the Hon'ble Apex Court in *IPCA Laboratory Ltd. v. Dy. CIT* [2004] 266 ITR 521(SC) in the context of a beneficial provision, i.e., s. 80HHC. The law of interpretation of statutes is clear, as clarified once again by it in *Ajmera Housing Corporation vs. CIT* [2010] 326 ITR 642 (SC) in the following words:

‘A taxing statute is to be construed strictly; in a taxing statute one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. In interpreting a taxing statute the court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute.’

Reference in this regard may also be made to *CIT vs. Calcutta Knitweaves* [2014] 362 ITR 673 (SC), clarifying that the foremost principle of interpretation of fiscal statutes – in every system of interpretation, is the rule of strict interpretation, which provides that where the words of the statute are absolutely clear and unambiguous, recourse could not had to the principles of interpretation other than the literal rule. That hardship and inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear and apparent. A departure from the literal rule should therefore only be in very rare cases, and ordinarily there should be judicial restraint to do so. The reason is simple. If not in the clear words employed by the Legislature, where is its intent to be found? This in fact represents trite law, as also explained by the Hon'ble Apex Court time and again, to several by which reference stands made by it in *Calcutta Knitweaves* (supra). *How could, then, we wonder, the provision be read as not attracted where the payment of the expenditure does not fall within any one of the excepting clauses of rule 6DD,*

enlisting the prescribed circumstances referred to in the first proviso to the main provisions?

We have already delineated the legislative intent, which is to be the foundational basis of any interpretative exercise (*CIT v. Baby Marine Exports* [2007] 290 ITR 323 (SC)), even as its language makes the provision unambiguously clear. It is the mode of payment under other than the prescribed modes, which is the basis on which the law becomes applicable. Saving in the form of excepting circumstances, precluding ss. 40A(3)/(3A), is provided per first proviso thereto read with the relevant rule (r. 6DD), *which is to be therefore strictly adhered to*. The same are based on considerations of availability of banking facilities; business expediency; and other relevant factors. These circumstances, despite the same parametric considerations (which include business exigencies), guiding their enumeration by way of delegated legislation (r. 6DD), have witnessed changes from time to time during the long history of the provision. However, ‘exceptional and unavoidable circumstances’; ‘impracticability of payment’; or ‘genuine difficulty’, present earlier per r. 6DD (j), obtain no longer. These, therefore, cannot be read into the clear enumeration of specified circumstances, as has been by the Id. CIT(A). Considerations of equity cannot be imported, particularly in a situation as the present case where the same operate to defeat the very purpose of or the object that the provision stands to achieve/attain. In fact, we observe no exceptional or unavoidable circumstance, nor any stands even contended at any stage, including impracticability or genuine difficulty; *the assessee’s case throughout being of genuineness of expenditure*. Genuineness of expenditure or genuineness of payment thereof are, as afore-stated, prerequisites for deduction of an expenditure in computing income, which falls to be considered even *de hors* and independent of section 40A(3), which only seeks to regulate its mode of payment. Why, would a non-genuine expenditure stand to be allowed

where paid in cash in installments which do not breach the prescribed limit or paid per account payee cheque (drawn on a bank) or a bank draft? Recent demonetization of November, 2016 has brought forth the fact of currency in circulation in Indian economy, as a ratio of GDP, as one of the highest in the world. The latest scaling down of the limit u/s. 40A(3), referred to earlier, could possibly have been guided by those and such like considerations, besides of course promoting payment through the banking sector/electronically. The recent move by the Government of India to link Adhaar (identity) with the bank accounts is one more attempt to link payment through banking channel with identity. Here it is pertinent to note that the provision during its long history has witnessed a disallowance in fraction (20%) to - for most part, a total disallowance, i.e., where the provision gets attracted.

The decision by the Hon'ble jurisdictional High Court in *Gurdas Garg* (supra) was rendered on the basis of the earlier rule 6DD(j) which, as was discovered subsequent to the pronouncement of the judgment in the open court by the Hon'ble Court, no longer existent. It thus correctly observed therein that section 40A(3) is not absolute in its terms and, therefore, excludes expenditure, genuineness of which is not in doubt and the payee/s is identifiable, i.e., where made under a business exigency. The same is in fact in consonance with the decision in *Attar Singh Gurmukh Singh* (supra) as well as the Board Circular 220 (supra). The issue arises only due to the amendments to the provision since, which makes it materially different from the provision before the Apex Court as well as the Hon'ble jurisdictional High Court. The Hon'ble Court admits this on the said discovery, yet, refrains from varying its decision, pronounced in the open court, noting that the parties may take appropriate proceedings, and that it was not expressing any view on the amended law. Reference in this regard may be made to paras 9 thro' 15 (excluding paras 11 – 14) of the judgment. *How could then, one*

may ask, the said decision be construed as an authority on the amended law, or as a binding judicial precedent qua the said law? In fact, as we subsequently discover, the decision has *since been recalled* by the Hon'ble High Court for fresh adjudication (vide order dated 30/9/2016 / copy on record), so that it exists no more. As regards the decision by the other Hon'ble High Courts, the same, as noted by the Hon'ble jurisdictional High Court, were also led through a wrong (since amended) provision. We have already noted, with reference to rule of interpretation, as elucidated by the Apex Court, that there is no scope for travelling outside the scope of the provision where its language is clear and unambiguous, as in the instant case, besides being *non obstante*, or of reading it down, by drawing on consideration of genuineness of expenditure or of a business exigency, not specifically provided, i.e., given the clear terms of the provision, which has had a long journey, and which is itself indicative of the legislative intent, and relevant. That a decision by a non-jurisdictional High Court is even otherwise not a binding precedent for the Tribunal, is well settled (refer: *Suresh Desai & Ass. v. CIT* [1998] 230 ITR 912 (Del); *Geoffery Manners & Co. Ltd. v. CIT* [1996] 221 ITR 695 (Bom); *CIT v. Thane Electricity Supply Ltd.* [1994] 206 ITR 797 (Bom); *Patil Vijayakumar v. Union of India* [1985] 151 ITR 48 (Kar)). There are, on the contrary, decisions galore, rendered during the long history of the provision, clarifying that, save as provided u/r. 6DD, the breach of the monetary limit for cash (or other than the prescribed modes of) payment would attract the rigor of s. 40A(3). In fact, several, including two by the Hon'ble jurisdictional High Court, were referred to by the Hon'ble Apex Court in *Attar Singh Gurmukh Singh* (supra) (at page 674 of the Reports). There is in fact abundant reference to case law by the special bench of the tribunal in *Kenaram Saha & Ors.* (supra). All these decisions are relevant, and relied upon.

We, accordingly, find little merit in the disregard of the clear and unambiguous provision of law by the Id. CIT(A). Section 40A(3), in view of the breach of the monetary limit specified therein, read with r. 6DD, providing for the excepting cases and circumstances, none found applicable, shall therefore apply.

6. We next proceed to adjudicate on the merits of the case, with a view to determine the extent of the applicability of s. 40A(3).

At the outset, we find it immensely odd that the consignments unloaded at the assessee's dumps, which are stated to be invariably on the same day, should have a freight component below Rs. 35,000 in-as-much as they are admittedly not directed to distant BKO's, which entails time for delivery. We say so as a consignment, to optimize freight cost (per unit coal transported), would, irrespective of the manner of its distribution (i.e., at the assessee's dumps or BKO), carry (almost) the same (pay) load and, thus, almost the same freight. Again, it is out of sync with business reality, and does not ring true that the assessee's employee/s with cash (in no insubstantial sum) is dispatched along with the truck, to be given to the trucker each day in a sum below the threshold limit. This is as manpower has a cost associated with it, and making payments to the trucker could not be the only purpose of sending its' employee along with. The delivery in any case is to be taken by the BKO, only on receipt by which - on the basis of gross and tare weight of the delivering truck, would the trucker be entitled to freight, which may otherwise stand to be adjusted against the shortage in goods. Why, there could be more than one such truck on a given day/s, so that more than one employee (of the assessee) would have to be spared for the purpose, increasing the manpower cost of taking delivery, the prime responsibility of which is in any case of the concerned BKO. Again, it will, in that case, have to necessarily give the total amount (of freight & toll) to the employee on day 1 and, therefore, the availability of cash shall have to be reckoned on that basis.

The explanation, despite the oddities afore-referred, has however been accepted by the AO, and we must say, very fairly. Though her order is not binding on us, we are disinclined to interfere with the said acceptance as, clearly, the delivery to the BKO's could be over days, extending beyond a single day. Besides, an assessee is entitled to arrange his affairs in a manner that the rigor of the provision is avoided. The AO's stance that it cannot be accepted that each payment would comprise toll and freight to the extent of 17% and 83% respectively, i.e., the same ratio as obtains in the aggregate payment for the year, as canvassed by the assessee before her, is also to be upheld. Each consignment would, firstly, have a different ratio, and being a matter of fact, the toll and freight payment would have to be adopted as obtaining for that consignment. Two, there is no reason for not reimbursing the toll amount in the first instance, except where there is a doubt with regard to the payment itself or (say) shortage of cash on that date. Payment of toll, even if in excess of Rs. 20,000 per day, would stand excepted u/s. 40A(3) read with rules 6DD (b), which reads as under:

‘(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;’

Further, the AO's stand that the payment, even if staggered over the time taken to effect delivery, could not exceed three days, on which (third day) therefore the entire balance freight stands paid, would seem to us as ‘ad hoc’ in-as-much as each consignment would take time depending on the vagaries of the situation on the ground. *That is, the matter is purely factual.* A truck may get stuck up for several hours/days due to traffic blockage, or for whatever reason. Another may get held up for unloading at the site, so on and so forth. *The onus to establish facts though is clearly on the assessee.* It seems highly improbable that each consignment should take as much time (days) for delivery, i.e., given the variables of pay load; distance; road and weather conditions; etc., impacting the said time, as

required to make the payment per day within the prescribed limit! That is, the assessee's claim that the payment has been made, in each individual case, over the time actually taken to effect delivery (for that consignment), valid in principle, would require being proved by it. This is as it is untenable and nobody's case that a truck is held up, i.e., after delivery, only to enable discharge of the balance amount in installments, so as to eschew section 40A(3). The arrival of a truck at the assessee's site or, as the case may be, point/station from where it is routed to its destination, co-opting assessee's employee in crew (to oversee delivery and make payments in cash installments); its journey across various tolls/octroi posts/check points on the way; arrival at its' destination (and weighment - gross and tare); unloading at site; journey back to the assessee's premises/work station, etc. would all stand to be evidenced. Subject to this factual verification, we approve the assessee's claim, i.e., in principle. The burden to prove its' return, and the claims preferred thereby, is only on the assessee (*CIT v. Venkataswamy Naidu* [1956] 29 ITR 529 (SC); *CIT v. Calcutta Agency Ltd.* [1951] 19 ITR 191 (SC)). The Assessing Officer shall, accordingly, adjudicate the matter, issuing definite findings of fact, on the basis of the material on record, and after allowing the assessee a reasonable opportunity to substantiate its' case. We decide accordingly.

7. Ground 2 by the Revenue is in respect of a disallowance at Rs.94,000/-, being 1/7th of the total expenditure (of Rs.6.56 lacs) under several heads of expenditure, viz. entertainment; langer; festival expenses; labour welfare; etc., incurred in cash and supported by self-made vouchers, so that the expenditure was not fully verifiable. Relief stands allowed by the first appellate authority on the ground that no specific defect stands pointed out by the AO. The Revenue's grievance is that it has not been appreciated that the expenditure stands incurred in cash per self-made vouchers, so that it is not fully verifiable. Like contentions were

raised before us. We find some merit in the case of either party. An expenditure does not become un-genuine merely because it stands incurred in cash. At the same time, cash expenditure per self-made vouchers is not amenable to verification. The two considerations are to be balanced, and the Revenue's case, as we understand, is one of inflation (of expenditure), which it estimates at 1/7th of the total expenditure. We direct it at 1/10th, and the Revenue gets part relief.

8. Ground 3 is toward disallowance for Rs.92,000/-, at the rate of 1/5th of expenditure on vehicles, viz. repair and maintenance, depreciation, etc., on account of personal, i.e., non-business user, which could not be denied in the absence of log records. The Id. CIT(A) has reduced it to 1/10th. We find no cause for interference. We decide accordingly.

9. In the result, the Revenue's appeal is partly allowed and partly allowed for statistical purposes.

Order pronounced in the open court on 18.04.2018

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 18.04.2018.

GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Assessee: Darshan Kumar Mahajan
- (2) The Asst. CIT, Jammu
- (3) The CIT(A)-2, Amritsar
- (4) The CIT, Amritsar
- (5) The Sr. DR, I.T.A.T.

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By Order