

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.3267/M/2017
Assessment Year: 2012-13**

M/s. Deogiri Transport, 53 Dutta Bhavan, Vijay Manjrekar Lane, Gokhale Road (North), Dadar (West), Mumbai - 400 028 PAN: AAHFD 1851B	Vs.	Asst. Commissioner of Income Tax, 21(1) Room No.116, 1 st Floor, Piramal Chambers, Parel, Mumbai - 400 012
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Pankaj R. Toprani, A.R.
Revenue by : Shri Ram Tiwari, D.R.

Date of Hearing : 17.04.2018
Date of Pronouncement : 14.05.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 28.02.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

2. The various grounds raised by the assessee are as under:

1. The learned ACIT erred in making addition of Rs.3,20,87,500/- invoking section 40A(3) & 40A(3A) of Income Tax Act, 1961 without considering the circumstances under which appellant had to make cash payment. The appellant relies on the following judgments where it was held that rule 6DD is illustrative and not exhaustive and the circumstances laid down in U) under rule 6DD should be considered liberally. The cases relied:

Anupam Teleservices Vs. ITO TA No.556/2013 (Guj HC)

Attar Singh Gurmukh Singh Vs. ITO Ludhiana 1991 AIR 2109 (SC)
Smt.Harshila Chordia Vs. ITO (2008) 298 ITR 349 (Raj HC)
Commissioner of Income Tax Vi vs Vatika Construction Pvt. Ltd. (Delhi
HC decided on 11-10-2012)
I.T.O. WD 12(1) Kolkata vs. Standard Leather Pvt. LTd. (ITA No.2620/Kol/2013
decided by Hon'ITAT 'C' Bench Kolkata)

Also learned ACIT never questioned about the genuiness of the expenditure nor identity of payee while passing the order. The appellant state that the expenditure was made in cash for business expediency otherwise appellant would have suffered business heavily. The appellant prays to delete entire additions in view of facts of the case.

2 The learned ACIT erred in making addition of Rs.3,20,87,500/invoking section 40A(3) & 40A(3A) of Income Tax Act, 1961 without considering the fact that the payments were made to the subcontractors which were not subjected to disallowance u/s 40A(3) & 40A(3A) of Income Tax Act, 1961 on peculiar fact of the case. The case relied on Commissioner of Income Tax & Others Vs. Balaji Engineering & Construction Works (2010) 323 ITR 351 (Kar HC)

3 The appellant craves leave to add, to alter or amend the above Grounds of appeal before or at the time of hearing of appeal.”

3. The only issue involved in the present appeal is against the decision of Ld. CIT(A) confirming the addition of Rs.3,20,87,500/- made by the AO invoking the provision of section 40A(3) and 40A(3A) of the Act

4. At the outset, the counsel drew our attention to the application filed under rule 29 of the Income Tax Appellate Tribunal Rules for admission of additional evidences which could not be filed before the authorities below and are filed from page No.77 to 90 of the paper book. The Ld. A.R. of the assessee submitted that since these evidences has a strong relevance and are directly connected to the issue involved in the appeal and therefore the same should be admitted in the interest of justice and fairplay. The Id DR on the other hand

objected to the admission of these evidences as the assessee was given sufficient opportunity in the assessment proceedings but despite that these evidences were not filed by the assessee.

5. We have heard the rival submissions of both the parties and perused the relevant material on record. A perusal of the application filed under rule 29 of the ITAT Rules reveals that all these documents are the confirmations of the truck operators to whom the payments have been made in cash and therefore has direct bearing to the issue at hand. In our opinion the assessee's application for additional evidences under rule 29 of ITAT rules deserved to be allowed. We are, therefore, inclined to admit these evidences. But since these evidences were not examined by the lower authorities, therefore, it would be in the interest of justice and fairplay to allow a reasonable opportunity to examine these documents and decide the issue afresh after taking into account all these evidences. The only issue involved in the present case is the payment to the truck operators exceeding Rs.35,000/- per day as per the proviso to section 40A(3) of the Act is allowable or not. The undisputed facts are that the assessee is engaged in the business of transportations of goods and the payments are normally insisted by the truck operators in cash and are made accordingly. The assessee has also taken one more plea before us that the truck owners are the agent of the assessee and therefore no TDS is required to be deducted from the payments to truck owners on account of freight charges. The Id AR argued that due to practical difficulties it is not possible

to make payment by cheques as these are not accepted by the truck owners. The Id AR submitted that this covered by the provisions of rule 6D as the exception specified therein are illustrative and not exhaustive and there could be circumstances beyond the instances as enumerated in rule 6D. The Ld. A.R. has raised the plea of truck operator being agent of the assessee for the first time before the Tribunal which is also not examined by the AO in the assessment proceedings. Under these circumstances, we are of the view that it would meet the interest of justice if the matter is restored to the file of AO to examine all these additional evidences and additional plea raised before us and decide the issue denovo based upon the facts and circumstances of the case. Accordingly, the matter is restored back to the file of the AO with the direction to decide the same afresh after allowing a reasonable opportunity to the assessee.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 14.05.2018.

**Sd/-
(Saktijit Dey)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 14.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.