

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'D' KOLKATA

[Before Hon'ble Shri P.M.Jagtap, AM & Shri S.S.Viswanethra Ravi, JM]

ITA No.762/Kol/2017
Assessment Year : 2013-14I.T.O., Ward-1(2)
Kolkata

-versus-

M/s Bolkunda Pachwai (S)CS Shop
Kolkata

(PAN: AAAAB 2700 K)

(Appellant)

(Respondent)

For the Appellant: Shri A.Bhattacharjee, Addl. CIT

For the Respondent: None

Date of Hearing : 12.04.2018.

Date of Pronouncement : 27.06.2018.

ORDER**Per S.S.Viswanethra Ravi, JM**

This is an appeal by the Revenue against the order dated 17.01.2017 passed by C.I.T-(A)-Asansol for A.Y.2013-14.

2. The only issue to be decided is as to whether the CIT(A) is justified in deleting the addition made by the AO holding the cash payments made to M/s Asansol Bottling and Packaging Co. Ltd is not a violation of section 40A(3) of the Income Tax Act, 1961 (Act).

3. The Id. DR relied on the order of the AO. The Id. AR submits that the issue in hand is covered by the decision of this Tribunal in assessee's own case for A.Y.2008-09 and 2009-10 passed by the Coordinate bench of this Tribunal. The Id. AR referred to the relevant portion in CIT(A)'s order and argued that cash payments made to M/s. Asansol Bottling and Packaging Co.Ltd is a warehouse under Rule 2 (vii) of West Bengal Excise Rule 2005 and the addition made by the AO on account of violation of

section 40A(3) of the Act is not maintainable and CIT(A) rightly deleted by placing reliance on the order of this Tribunal in assessee's own case.

4. Heard the rival submissions and perused the material available on record. We find that the CIT(A) by placing reliance in assessee's own case in ITA No.165 & 166/Kol/2014 for A.Y.2008-09 and 2009-10 deleted the addition made by the AO u/s 40A(3) of the Act. The relevant portion of the impugned order is reproduced herein below :-

Decision-

The assessee has relied on the decision of the jurisdictional tribunal in their own case in ITA Nos. 165 & 166/Kol/2011 for the assessment-years 2008-09 & 2009-10. In this case the Hon'ble Tribunal has discussed the issue of cash purchase made by the assessee from Asansol Bottling & Packaging Co. Pvt. Ltd. the Hon'ble Tribunal has held as under.-

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 under section 22 of the Bengal Excise Act, 1909. At this juncture, it would be relevant to go into the definition of warehouse as provided under [he State Excise Rules 2005 as below :

“Warehouse “, under Rule 2 (vii) of the W.B.Excise Rules 2015, 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 packing or selling country spirit by wholesale has been granted under section 22 of the Act, or of a 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 State Government or by the licensee to whom the exclusive privilege is granted under section 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 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 by 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 specific 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 with 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 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 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 is to be construed as payment made to the State Government authority and accordingly falls under the exception provided in Rule Rule 6DD(b) of the IT Rules.

It is not in dispute that M/s Asansol Bottling & Packaging Co. Pvt. Ltd. have been granted licence 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 rely 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 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 retailere) and Government of West Bengal (the supplier) acting under West Bengal Excise Rules through its Authorised wholesaler Licensee (Agent), both de facto and dejure, 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 Rule 6DD(k) of the Rules.

The Ld. Authorised Representative had advanced another argument that the payment is made by the assessee to State Bank of India and accordingly the same would fall under the exception provided in Rule Rule 6DD(a) of the Rules. We find that the assessee had made payments only to the customer of State Bank India and not to State Bank of India. Hence the assessee's case does not fall under the exception provided in Rule Rule 6DD (a) of the Rules.

We hold from the aforesaid findings that the assessee's case falls under the exceptions provided in Rule 6DD(b) and Rule 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 under section 40A(3) of the Act. Accordingly the Ground No. 2 raised by the assessee for both the years under appeal is allowed.

I am of the opinion that the issue under consideration is covered by the decision of jurisdictional Tribunal. The facts of the impugned case is same in this year also. Respectfully following the above decision of jurisdictional ITAT in assessee's own case the appeal of the assessee is hereby allowed. The disallowance made by the A.O under section 40A(3) of Rs, 87,77,162/- is hereby deleted.”

5. In view of the above we find no infirmity in the order of CIT(A) and the grounds raised by the revenue are dismissed.

6. In the result the appeal of the revenue is dismissed.

Order pronounced in the open Court on 27.06.2018.

Sd/-

[P.M.Jagtap]
Accountant Member

Sd/-

[S.S.Viswanethra Ravi]
Judicial Member

Dated : 27.06.2018.

[RG Sr.PS]

Copy of the order forwarded to:

- 1.M/s Bolkunda Pachwai (S) C.S.Shop, Vill-Bolkunda, P.O.Samdi, Dist. Burdwan-713354.
2. I.T.O., Ward-1(2), Asansol.
3. C.I.T.(A)-Asansol 4. C.I.T.-Asansol
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches