

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH**

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.750/Chd/2017
(Assessment Year : 2012-13)

Shri Jai Teg Singh,
2431, Sector 79,
Mohali.

Vs.

The Income Tax Officer,
Ward-6(2),
Mohali.

PAN: ARJPS5960R

(Appellant)

(Respondent)

Appellant by : Shri S.K.Bhasin, CA
Respondent by : Smt.Chanderkanta, Addl.CIT, DR

Date of hearing : 17.07.2018

Date of Pronouncement : 17.07.2018

ORDER

PER ANNAPURNA GUPTA, A.M. :

This appeal has been preferred by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-2, Chandigarh dated 16.3.2017 relating to assessment year 2012-13.

2. The sole issue in the present appeal relates to disallowance of expenditure incurred in cash beyond the limits prescribed, as per the provisions of section 40A(3) of the Income Tax Act, 1961 (in short 'the Act').

3. Brief facts relevant to the issue are that the assessee is in the business of real estate. On examination of books of account of the assessee, the Assessing Officer noticed that the assessee had made payments in cash to various persons for the purchase of plots in the course of carrying out its for the purpose of

business of the assessee in violation of the provisions of section 40A(3) of the Act. Accordingly, the Assessing Officer disallowed the expenditure which amounted in all to Rs.38,98,380/- u/s 40A(3) of the Act.

4. Before the Ld.CIT(Appeals), the assessee contended that no disallowance u/s 40A(3) of the Act was warranted since the genuineness of the transaction had not been disbelieved by the Assessing Officer and further that there were compelling reasons for making the aforesaid payments in cash since the land owners were female and were in urgent need of funds and insisted the assessee to make payments in cash. The assessee, therefore, contended that the payment was made on account of the said transaction in cash due to the said business expediency. The assessee contended that in view of the same, since the genuineness and business expediency of the transaction had been established, no disallowance u/s 40A(3) of the Act was warranted. Reliance in this regard was placed on the decision of the Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh Vs. ITO, Ludhiana 1991 SCR (3) 405 and the decision of the Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg Vs. CIT Bathinda, 63 Taxmann 289.

5. The Ld.CIT(Appeals) rejected the submissions made by the assessee stating that the decision of the Hon'ble Apex Court related to assessment year wherein the provisions of section 40A(3) were interpreted alongwith Rule 6DD(j) of the Income Tax Rules which was applicable in that assessment year and which having been amended and not being applicable for the impugned

assessment year, the same were not applicable to the case of the assessee. The Ld.CIT(Appeals) also distinguished the decision of the Hon'ble Punjab & Haryana High Court stating that the Hon'ble High Court had observed in the said judgment that it had failed to consider the effect of exclusion of Rule 6DD(j) and that the parties were free to adopt appropriate proceedings with regard thereto. Ld.CIT(A) therefore held that since the assessee's case did not fall in any of the exclusionary clauses specified in Rule 6DD of the Income Tax Rules, 1962, for the purposes of disallowing expenses u/s 40A(3) of the Act, the disallowance was warranted. The Ld.CIT(Appeals) further held that in any case, the assessee had not been able to establish with evidence the business expediency for making the payment in cash and, therefore, held that the assessee could not be saved from the rigors of the provisions of section 40A(3) of the Act and upheld the disallowance so made by the Assessing Officer. The relevant findings of the Ld.CIT(Appeals) at paras 5.3 to 5.3.2 of his order are as under:

“5.3 Submissions of the appellant have been considered. Appellant has mainly relied upon the judgement of Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg (supra). In this judgement Hon'ble High Court has referred the decision of Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh (supra) relied upon by the appellant. The decision in Attar Singh Gurmukh Singh (supra) relates to assessment year 1971-72 and this decision was on the interpretation of section 40A(3) read with Rule 6DD(j) as applicable in that assessment year. Hon'ble P&H High Court while holding the payments cannot be disallowed u/s 40A(3) of the Act made the following observation in the same judgement.

"15) We pronounced the judgment in open court on the conclusion of the arguments. While finalizing the judgement, we noticed a discrepancy between Rule 6DD as downloaded from the internet which was tendered in Court and Rule 6DD reproduced in several judgements including in Attar Singh Gurmukh Singh (supra), Smt. Harshila Chordia (supra), Cit vs. Ashoka Steel Industries and Flour Mills [2007] 293 ITR 192 (P&H), vs. Brij Mohan Singh & Co. [1994] 209 ITR 753 (P&H) and Girdhari Lal Geoenka vs. CIT[1986] 179 ITR 122 (cat.)

The material difference really is in clause 6-j of Rule 6DD. On further research we found that Rule 6DD was amended by the Income Tax (7th Amendment Rules), 2008. Sub Rule 2 of Rule 1 states that the same shall come in to force with effect from the assessment year 2009-10 which is the assessment year in question in this case the amendment appears to have been by a notification dated 10.10.2008 issue by the Ministry of Finance (Department of Revenue) CBDT. The opening part of the notification reads as follows:-

" S.O. 2431 (E) - In exercise of the powers conferred by section 295 read with proviso to sub section (3A) of section 40A of the Income Tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby made the following rules further to amend the Income Tax Rules, 1962, namely:-

- 1) These rules may be called the Income Tax (7th Amendment) Rules, 2008.
- 2) They shall come in to force w.e.f. AY 2009-10.

2. In the Income Tax Rules, 1962, for Rule 6DD the following rule shall be substituted namely :-

"Cases and circumstances in which a payment or aggregate of payments exceeding twenty thousand rupees may be made to a person in a day otherwise than by an account payee cheque drawn on a bank account of payee bank draft"

As we had already pronounced the judgment in open court, it is not open to us at this stage to examine the effect of the amendment to Rule 6DD. We express no opinion in regard thereto except to state that the relevant clause appears to have been amended. It is always open to the parties to adopt appropriate proceedings with regard thereto. Needless to say we express no opinion regarding any proceedings that may be adopted including for a review of the Judgement."

5.3.1 Rule 6DD as applicable to assessment years prior to AY 2009-10, it is seen that clause (j) was omitted w.e.f. 25.07.1995. Prior to omission clause (j) read as under:-

In any other case, where the assessee satisfies the Assessing Officer that the payment could not be made by a crossed cheque drawn on a bank or by a crossed bank draft.

(1) *Due to exceptional or unavoidable circumstances, or*

(2) *Because payment in the manner aforesaid was not practicable or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof:*

And also furnishes evidence to the satisfaction of the assessing officer as to the genuineness of the payment and the identity of the payee."

5.3.2 From the above discussion, it is seen that the decisions of Hon'ble Supreme Court in *Attar Singh Gurmukh Singh (supra)* and of Hon'ble (P&H) High Court in *Gurdas Garg (supra)* were on the basis of pre-amended Rule 6DD(j) and the same is not applicable on amended Rule 6DD which has been amended and is applicable w.e.f. AY 2009-10. The present rule 6DD(j) reads that " where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike" is not relevant in the case of the assessee. Rule 6DD provides for certain exceptions in which payments can be made other than account payee cheque in the circumstances listed therein. The case of appellant is not covered by any of the circumstances mentioned in the aforesaid Rule. Appellant has taken plea that the sellers of the plots were in urgent need of funds and they insisted to pay consideration in cash is not acceptable as no material was brought on record to substantiate this contention. Hon'ble Andhra Pradesh High Court in the case of *S Venkata Subba Rao vs. CIT 173 ITR 340* have held that the explanation of the assessee that the parties insisted on cash payment and there is no evidence to corroborate this contention the payments made is not allowable deduction. Similarly has been held by Hon'ble Patna High Court In the case of *Narayan Bijoy Kumar vs. CIT 163 ITR 695* that assessee showed a certificate from the other party insisting for case payment which is not sufficient as no cause was shown necessitating cash payment. Therefore in view of the above, it is held that assessee has made cash purchases for his business and violated the provisions of section 40A(3) of the Act, Hence the disallowance made by the assessing officer of Rs. 38,98,380/- u/s 40A(3) is upheld."

6. Aggrieved by he same, the assessee has come up in appeal before us, raising the following grounds:

"1. The order of learned assessing officer is bad in law and on facts.

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the order of learned A.O. for making addition of Rs 38,98,3807- by applying the provisions of section 40A(3) of the Income Tax Act, 1961.*
3. *The appellant craves leave to add or amend any grounds of appeal before the appeal is heard or is disposed off."*

7. During the course of hearing before us, the Ld. counsel for assessee reiterated the contention made before the CIT(Appeals), that the provisions of section 40A(3) of the Act were not attracted in the present case since the genuineness of the transaction had not been doubted and the compelling circumstances for making the payment in cash had also been brought to the notice of the authorities below . Reliance was placed on the following decisions in this regard:

- 1) Attar Singh Gurmukh Vs. ITO, Ludhiana
1991 SCR (3) 405
- 2) Gurdas Garg Vs. CIT, Bathinda
ITA No.344(Asr)/2015
- 3) Rakesh Kumar Vs. ACIT, Bathinda
ITA No.102(Asr)/2014

8. The Ld. counsel for assessee further drew our attention to the copy of the General Power of Attorney of the sellers as evidence of the genuineness of the transaction, placed at Paper Book pages 44 to 57. The Ld. counsel for assessee also drew our attention to the submissions made before the Ld.CIT(Appeals) explaining the business expediency for making the payment in cash, reproduced at para 5.2 of the order as under:

"5.2 Appellant made submissions as under. -

(i) The land owners sold their personal assets and not doing any business & thus are not aware of provisions of Income Tax Act, 1961. Moreover the land owners are females and were in the urgent need of funds and they insisted assessee to pay consideration in cash. Therefore the assessee paid cash directly after withdrawing it

from bank due to the said business expediency. It was further submitted that the genuineness of the transaction has not been disbelieved by the assessing officer. Hence, the disallowance u/s 40A(3) cannot be made where the genuineness of payment is not disbelieved by the assessing officer. Appellant has placed reliance on the decision of Hon'ble Supreme Court of India in the case of Attar Singh Gurmukh Singh vs. ITO, Ludhiana 1991 SCR (3) 405 and the decision of Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg vs. CIT Bathinda 63 Taxmann 289.

(ii) It was submitted that assessee's case is similar to the cases referred above as the assessing officer has not doubted the genuineness of the payment made to the sellers."

9. The Ld. DR, on the other hand, relied upon the order of the CIT(Appeals) and emphasized that no benefit can be derived by the assessee from the decisions relied upon by it since they were rendered in the context of Rule 6DD(j) of the Income Tax Rules, read alongwith section 40A(3) of the Act, which was prevalent at that point of time and the same having since then been amended and deleted from the Rules, the said decision would not be applicable in the facts of the present case.

10. We have heard the contentions of both the parties and gone through the orders of the authorities below and also the documents and decisions cited before us.

11. The issue before us pertains to disallowance of expenditure made u/s 40A(3), which provides for disallowance of expenditures incurred other than by way of account payee bank draft or cheque ,beyond the prescribed limit.

12. The contention of the Revenue in support of the disallowance is two fold;

a) the business expediency for violating the provision of section 40A(3),is not covered in any of the exclusionary

circumstances listed in Rule 6DD of the Income Tax Rules, 1962,

b) that even otherwise, the business expediency explained is unsubstantiated and, therefore, unacceptable.

13. As for the first contention of the Revenue, the same, we find, is unacceptable in view of the various judicial pronouncements on the issue reiterating time and again that despite the exclusion of Rule 6DD(j) from the Rules, the assessee can still escape the disallowance u/s 40A(3) of the Act by demonstrating business expediency. In fact, in the latest decision the Coordinate Bench of the I.T.A.T., Jaipur in the case of M/s A.K. Daga Royal Arts Vs. ITO in ITA No.1065/Jp/2016 dated 15.5.2018, the ITAT has after considering various judicial decisions on the issue, reiterated this view holding that Rule 6DD is not exhaustive and the mere fact that the transaction did not fall under Rule 6DD would not mean that the disallowance per force was to be made. The relevant findings of the I.T.A.T. is as under:

"18. We have heard the rival contentions and perused the material available on record. It would be relevant to refer to the provisions of section 40A(3) of the Act which reads as under:

"(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 cheque 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:

Provided 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.

(4) Notwithstanding anything contained in any other law for the time being in force or in any contract, where any payment in respect of any expenditure has to be made by an account payee cheque drawn on a bank or account payee bank draft in order that such expenditure may not be disallowed as a deduction under sub-section (3), then the payment may be made by such cheque or draft; and where the payment is so made or tendered, no person shall be allowed to raise, in any suit or other proceeding, a plea based on the ground that the payment was not made or tendered in cash or in any other manner."

19. The aforesaid provisions have to be considered and interpreted in light of various authorities which have been quoted at the Bar and relied upon by the Id AR and Id DR in support of their respective contentions.

20. In case of **Attar Singh Gurmukh Singh v. ITO (supra)**, the matter which came up for consideration before the **Hon'ble Supreme Court**, the facts of the case were that assessee had made payment in cash exceeding a sum of Rs. 2,500/- for purchase of certain stock-in-trade. Payments were not allowed as deductions in the computation of income under the head "profits and gains of business or professions" as the same were held to be in contravention of section 40A(3) read with that 6DD of the Income rules. In that factual background, the question regarding validity of section 40A(3) and applicability of the said provisions to payment made for acquiring stock-in-trade came up for consideration before the Hon'ble Supreme Court.

21. The Hon'ble Supreme Court referring to the provisions of section 40A(3) and Rule 6DD and in particular, Rule 6DD(j), as existed at relevant point in time, has held as under:-

"6. As to the validity of section 40A(3), it was urged that if the price of the purchased material is not allowed to be adjusted against the sale price of the material sold for want of proof of payment by a crossed cheque or crossed bank draft, then the income-tax levied will not be on

the income but it will be on an assumed Income. It is said that the provision authorizing levy tax on an assumed income would be a restriction on the right to carry on the business, besides being arbitrary.

7. In our opinion, there is little merit in this contention. Section 40A(3) must not be read in isolation or to the exclusion of rule 6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading/ activities. Section 40A(3) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources. The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and rule 6DD that they are intended to regulate the business transactions and to prevent the use of unaccounted money or reduce the chances to use black-money for business transactions. - Mudiam Oil Co. v. ITO [1973] 92ITR 519 (AP). If the payment is made by a crossed cheque on a bank or a crossed bank draft, then it will be easier to ascertain, when deduction is claimed, whether the payment was genuine and whether it was out of the income from disclosed sources. In interpreting a taxing statute the Court cannot be oblivious of the proliferation of black-money which is under circulation in our country. Any restraint intended to curb the chances and opportunities to use or create black-money should not be regarded as curtailing the freedom of trade or business."

22. Further, the Hon'ble Supreme Court upheld the applicability of section 40A(3) to payment made for acquiring stock-in-trade and raw materials and also affirmed the decision of Hon'ble Rajasthan High Court in case of Fakri Automobiles v. CIT [1986] 160 ITR 504 (Raj) to the effect that the payments made for purchasing stock-in-trade or raw material should also be regarded as expenditure for the purposes of section 40A(3) of the Act.

23. The Hon'ble Supreme Court has therefore upheld the constitutional validity of section 40A(3) of the Act and has held that the provisions are not intended to restrict the business activities and restraint so provided are only intended to curb the chances and opportunities to use or create black money and the same should not be regarded as curtailing the freedom of trade or business. The Hon'ble Supreme Court has thus laid great emphasis on the intention behind introduction of these provisions and it would

therefore be relevant to examine whether in the present case, there is any violation of such intention and if ultimately, it is determined that such intention has been violated, then certainly, the assessee deserves the disallowance of the expenditure so claimed.

24. *The Hon'ble Supreme Court referring to the provisions of section 40A(3) as existed at relevant point in time which talks about considerations of business expediency and other relevant factors and Rule 6DD(j) which provides for the exceptional or unavoidable circumstances and the fact that the payment in the manner aforesaid was not practical or would have caused genuine difficulty to the payee and furnishing the necessary evidence to the satisfaction of the Assessing Officer as to the genuineness of the payments and the identity of the payee has held that:*

"The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule."

25. *Here, it is relevant to note that there has been no change in the provisions of section 40A(3) in so far as considerations of business expediency and other relevant factors are concerned, as existed at relevant point in time and as considered by the Hon'ble Supreme Court and the provisions of section 40A(3) as exist now and relevant for the impugned assessment year i.e. AY 2013-14. However, Rule 6DD(j) has been amended and by notification dated 10.10.2008, it now provides for an exception only in a scenario where the payment was required to be made on a day on which banks were closed either on account of holiday or strike. A question which arises for consideration is whether the legal proposition so laid down by the Hon'ble Supreme Court regarding consideration of business expediency and other relevant factors has been diluted by way of delegated legislation in form of Income Tax Rules when the parent legislation in form of section 40A(3) to which such delegated legislation is subservient has been retained in its entirety. Alternatively, can it be said that what has been prescribed as exceptional circumstances in Rule 6DD as amended are exhaustive enough and which visualizes all kinds and nature of business expediency in all possible situations.*

26. *If we look at the legislative history of section 40A(3) and Rule 6DD, we find that initially, section 40A(3) provides for disallowance of 100% of the expenditure unless the matter falls under exception as provided in Rule 6DD(j) Later on, section 40A(3) has been amended to provide for disallowance of 20% of the expenditure incurred in cash and Rule 6DD(j) was*

omitted. Thereafter, by virtue of another amendment, disallowance under section 40A(3) was increased from 20% to 100%, however, Rule 6DD(j) was not reintroduced in original form to provide for exceptional and unavoidable circumstances rather it was restricted to payment by way of salary to employees and thereafter, by virtue of latest amendment in year 2008 to payments made on a day on which the banks were closed on account of holiday or strike.

27. We do not believe that by virtue of these amendments, the legal proposition so laid down by the Hon'ble Supreme court regarding consideration of business expediency and other relevant factors has been diluted in any way. At the same time, we also believe that Rule 6DD as amended are not exhaustive enough and which visualizes all kinds and nature of business expediency in all possible situations and it is for the appropriate authority to examine and provide for a mechanism as originally envisaged which provides for exceptional or unavoidable circumstances to the satisfaction of the Assessing officer whereby genuine business expenditure should not suffer disallowance.

28. Further, the Courts have held from time to time that the Rules must be interpreted in a manner so as to advance and not to frustrate the object of the legislature. The intention of the legislature is manifestly clear and which is to curb the chances and opportunities to use or create black money and to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources. And Section 40A(3) continues to provide that no disallowance shall be made in such cases and under such circumstances as may be prescribed having regard to the nature and extent of the banking facilities available, consideration of business expediency and other relevant factors. In our view, given that there has been no change in the provisions of section 40A(3) in so far as consideration of business expediency and other relevant factors are concerned, the same continues to be relevant factors which needs to be considered and taken into account while determining the exceptions to the disallowance as contemplated under section 40A(3) of the Act so long as the intention of the legislature is not violated. We find that our said view find resonance in decisions of various authorities, which we have discussed below and thus seems fortified by the said decisions.

29. We refer to the decision of the **Hon'ble Rajasthan High Court** in case of **Smt. Harshila Chordia vs. ITO (supra)**, where the facts of case were that the assessee had made certain cash payments towards purchase of scooter/mopeds which exceeded Rs. 10,000/- in each case to the principal agent instead of making payment through the cross cheques or bank draft. The Assessing Officer invoked the provisions of section 40A(3) and held that they were no exceptional circumstances falling under rule 6DD which could avoid consequences of the provisions of section 40A(3) of the Act. The Id. CIT(A) held that such exceptional circumstances did exist. However, the findings of the Id. CIT(A) were reversed by the Tribunal and the matter came up for consideration before the Hon'ble

High Court.

30. *The Hon'ble High Court observed that the principal reason which weighed with the Tribunal in discarding the explanation furnished by the assessee was that the case of the assessee did not fall in any of the clauses enumerated in the circular issued by the CBDT about the explanatory note appended to clause (j) was to operate as it was existing at the relevant time and enumerated circumstances in the circular was exhaustive of exceptional circumstances. The Hon'ble High Court observed that the Tribunal has erroneously assumed that enumeration of instances in the circular in which the provisions of clause (j) under rule 6DD would operate to be exhaustive of such circumstances and had not been properly understood its implication. It was further observed by the Hon'ble High Court that primary object of enacting section 40A(3) in its original incarnation was two-fold, firstly, putting a check on trading transactions with a mind to "evade the liability to tax on income earned out such transaction and, secondly, to inculcate the banking habits amongst the business community. The consequence which was provided was to disallow of deduction of such payments/expenses which were not through bank either by crossed cheques or by demand draft or by pay order. It was further held by the Hon'ble High Court that:*

"Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequences, which were to befall on account of non-observation of sub-section (3) of section 40A must have nexus to the failure of such object. Therefore the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration which has been overlooked by the Tribunal.

31. *It was accordingly held by the Hon'ble High Court that it is the relevant consideration for the assessing authority under the Income Tax Act that before invoking the provisions of section 40A(3) in light of Rule 6DD as clarified by circular of the CBDT that whether the failure on the part of the assessee in adhering to requirement of provisions of section 40A(3) has any such nexus which defeats the object of provision so as to invite such a consequence. This is particularly so, because the consequence provided u/s 40A(3) for failure to make payments through bank is not absolute in terms nor automatic but exceptions have been provided and leverage has been left for little flexing by making a general provision in the form of clause (j) in rule 6DD. Thereafter, the Hon'ble High Court refers to the clause 6DD(j) and the circular dated 31st May, 1977 issued by the Board in the context of what shall constitute exceptional and unavoidable circumstances within the meaning of section Clause (j). The Hon'ble High Court observed that the circular in paragraph 5 gives a clear indication that rule 6DD(j) has to be liberally construed and ordinarily where the genuineness of the transaction and the payment and the identity of the receiver is established, the requirement of rule 6DD(j) must be deemed to have been satisfied. The Hon'ble High Court observed that apparently section 40A(3) was intended to penalize the tax evader and not the honest transactions and that is why after framing of*

rule 6DD(j), the Board stepped in by issuing the aforesaid circular and this clarification, in our opinion, is in conformity with the principle enunciated by the Supreme Court in *CTO vs. Swastik Roadways* reported in [2004] 2 RC 539; [2004] 3 SCC 640.

32. The legal proposition that arises from the above decision of the Hon'ble Rajasthan High Court is that the consequences, which were to befall on account of non-observation of sub-section (3) of section 40A must have nexus to the failure of such object. Therefore the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration and which should be examined before invoking the rigours of section 40A(3) of the Act.

33. In case of **Anupam Tele Services v. Income Tax Officer**, the matter which came up for consideration before the **Hon'ble Gujarat High Court**, the facts of the case were that the assessee who is involved in the business of distribution mobile and recharge vouchers of Tata Tele Services Ltd had made payment of Rs. 33,10,194/- to Tata Tele Services Ltd., by cash on different dates. The assessee had made such payment through account payee cheques till 22nd Aug, 2005, when a circular was issued by Tata Tele Services Ltd., requiring the appellant to deposit cash at the company's office at Surat. In that factual background, the Hon'ble High Court held as under:-

"17. Rule 6DD of the IT Rules, 1962 provides for situations under which disallowance under s. 40A(3) shall not be made and no payment shall be deemed to be the profits and gains of business or profession under the said section. Amongst the various clauses, d. (j) which is relevant, read 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;

18. It could be appreciated that s. 40A and in particular sub-cl. (3) thereof aims at curbing the possibility of on-money transactions by insisting that all payments where expenditure in excess of a certain sum (in the present case twenty thousand rupees) must be made by way of account payee cheque drawn on a bank or account payee bank draft.

As held by the Apex Court in case of *Attar Singh Gurmukh Singh (supra)*. ".In our opinion, there is little merit in this contention. Sec.40A(3) must not be read in isolation or to the exclusion of r.6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading activities. Sec. 40A(3) only empowers the A.O. to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources. The terms of s.40A(3) are not

absolute. Considerations of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the A.O. the circumstances under which the payment in the manner prescribed in s. 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of s. 40A(3) and r. 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions:"

20. *It was because of these considerations that this Court in case of Hynoup Foods (P.) Ltd. (supra) observed that the genuineness of the payment and the identify of the payee are the first and foremost requirements to invoke the exceptions carved out in r. 6DD(j) of the IT Rules, 1962.*

21. *In the present case, neither the genuineness of the payment nor the identity of the payee were in any case doubted. These were the conclusions on facts drawn by the CIT(A). The Tribunal also did not disturb such facts but relied solely on r. 6dd(j) of the rules to hold that since the case of the assessee did not fall under the said exclusion clause nor was covered under any of the clauses of r. 6DD, consequences envisaged in s. 40A(3) of the Act must follow.*

22. *In our opinion, the Tribunal committed an error in coming to such a conclusion. We would base our conclusions on the following reasons:*

(a) The paramount consideration of section 40A(3) is to curb and reduce the possibilities of black money transactions. As held by the Supreme Court in Attar Singh Gurmukh Singh (supra), section 40A(3) of the Act does not eliminate considerations of business expediencies.

(b) In the present case, the appellant assessee was compelled to make cash payments on account of peculiar situation. Such situation was as follow-

(i) the principal company, to which the assessee was a distributor, insisted that cheque payment from a co-operative bank would not do, since the realization takes a longer time;

(ii) the assessee was, therefore, required to make cash payments only;

(iii) Tata Tele Services Ltd. assured the assessee that such amount shall be deposited in their bank account on behalf of the assessee;

(iv) It is not disputed that the Tata Tele Services Ltd. did not act on such promise;

(v) if the assessee had not made cash payment and relied on cheque payments alone, it would have received the recharge vouchers delayed by 4/5 days and thereby severely affecting its business operations.

We would find that the payments between the assessee and the Tata Tele Services Ltd. were genuine. The Tata Tele Services Ltd. had insisted that such payments be made in cash, which Tata Tele Services Ltd. in turn assured and deposited the amount in a bank account. In the facts of the present case, rigors of s. 40A(3) of the Act must be lifted.

23. We notice that the Division Bench of the Rajasthan High Court in case of Smt. Harshila Chord/a vs. ITO (2007) 208 CTR (Raj) had observed that the exceptions contained in r. 6DD are not exhaustive and that the said rule must be interpreted liberally."

*34. In case of **M/s Ajmer Food Products Pvt. Ltd., Ajmer vs. JCIT** (supra), a similar issue has come up before the Co-ordinate Bench and speaking through one of us, it was held as under:*

"4.5 The genuineness of the transaction as well as the identity of the payee are not disputed. Further, the appellant has explained the business expediency of making the cash payments to both the parties which has not been controverted by the Revenue. Following the decision of Gujarat High Court in case of Anupam Tele Services (supra) and Rajasthan High Court in case of Harsh ila Chord/a (supra), the addition of Rs. 45,738/- under section 40A(3) is deleted. "

*35. In case of **Gurdas Garg vs. CIT(A), Bathinda (supra)**, the matter which came up for consideration before the **Hon'ble Punjab & Haryana High Court**, the facts of the case are pan materia to the instant case and the ratio of the said decision clearly applies in the instant case. In that case, the facts of the case were that the assessee was engaged in trading in properties and during the course of assessment proceedings, the AO observed that there are transactions where the payments have been made in excess of Rs. 20,000/- in cash which were disallowed u/s 40A(3) of the Act. The Hon'ble High Court held that rule 6DD(j) is not exhaustive of the circumstances in which the proviso to section 40A(3) is applicable and it only illustrative. The Hon'ble High Court refers to the decision of the Hon'ble Rajasthan High Court in case of Smt. Harshila Chordia v. ITO (Supra) and the decision of Hon'ble Supreme Court in case of Attar Singh Gurmukh Singh v. ITO (Supra). The High Court further observed that the Id. CIT(A) has given a finding that the identity of the payee i.e. vendors in respect of land purchase by the appellant was established, the sale deeds were produced, the genuineness thereof was accepted and the amount paid in respect of each of these agreement was satisfied before the Stamp Registration Authority and the transactions were held to be genuine and the bar against the grant of deductions u/s 40A(3) of the Act was not attracted. The Hon'ble High Court further observed that the Tribunal did not upset these findings including as to the genuineness and the correctness of the transactions and it is also important to note that the Tribunal noted the contention on behalf of the appellant*

that there was a boom in the real estate market and therefore it was necessary, therefore, to conclude the transactions at the earliest and not to postpone them; that the appellant did not know the vendors and obviously therefore, insisted for payment in cash and that as a result thereof, payments had to be made immediately to settle the deals. The Tribunal did not doubt this case. The Tribunal, however, held that the claim for deduction was not sustainable. In view of Section 40A(3) as the payments which were over Rs. 20,000/- were made in cash. The Hon'ble High Court accordingly observed that "the Tribunal has not disbelieved the transactions or the genuineness thereof nor has it disbelieved the fact that payments having been made. More importantly, the reasons furnished by the appellant for having made the cash payments, which we have already adverted to, have not been disbelieved. In our view, assuming these reasons to be correct, they clearly make out a case of business expediency."

36. *The Co-ordinate Bench in case of **M/s Dhuri Wine vs DCIT** (ITA No, 1155/chd/2013 & others dated 09,10.2015) has held that the proposition so laid down by the Hon'ble High Court in case of Gurdas Garg (supra) is quite unambiguous to the effect that even if the case of the assessee does not fall in any of the clauses of Rule 6DD of the Income Tax Rules, invoking the provisions of section 40A(3) of the Act can be dispensed with if the assessee is able to prove the business expediency because of which it has to make the cash payments, the genuineness of the transactions have also to be verified.*

37. *The Co-ordinate Bench in case of **Rakesh Kumar vs. ACIT** (ITA No. 102(Asr)/2014 dated 09.03.2016) relying on the decision of Hon'ble Punjab and Haryana High Court in case of Gurdas Garg (supra) has held that the genuineness of the payment has not been doubted as the Assessing Officer himself has held that sale deeds of properties were registered with the Revenue department of the Government. Therefore, following the decision of Hon'ble Punjab and Haryana High Court, the payment for purchase of land was allowed.*

38. *We further note that in case of **M/s ACE India Abodes limited (DB Appeal No. 45/2012 dated 11.09.2017)**, a similar issue has come up before the **Hon'ble Rajasthan High Court** regarding payment for purchase of land from various agriculturist for which the assessee has paid consideration in cash and shown the land as its stock-in-trade. The Hon'ble Rajasthan High Court referring to the intent behind introduction of section 40A(3) and catena of decisions right from Attar Singh Gurmukh Singh, Smt. Harshila Chordia, Gurdas Garg, Anupam Tele Services referred supra has decided the issue in favour of the assessee and against the department.*

14. Since the I.T.A.T. in the said case has rendered the decision after considering legislative history of section and various judicial pronouncements including the decision of the Hon'ble

Rajasthan High Court in the case of Harshila Chordia Vs. ITO, 298 ITR 349 and the Hon'ble Gujarat High Court in the case of Anupam Tele Services (2014) 362 ITR 92 alongwith the decision of the Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg Vs. CIT Bathinda (supra), the same squarely applies to the case before us. Therefore, the contention of the Revenue that the assessee can derive no benefit from the decision of the Hon'ble Jurisdictional High Court in the case of Gurdas Garg (supra) in which the Hon'ble High Court had stated that the order was rendered on reading pre-amended provisions of Rule 6DD which included sub clause(j), merits no consideration and the same is, therefore, dismissed. Even otherwise, we find, that despite the categorical observation of the jurisdictional high court that the parties are free to take appropriate action since the decision has not been rendered considering the exclusion of Rule 6DD(j), nothing was brought to our notice regarding any action taken by the Revenue against the said order by way of review petition filed or any other manner. It therefore stands to reason that the decision of the jurisdictional high court has been accepted as being applicable in the post amendment scenario of the Rules.

In view of the above, we hold that the disallowance u/s 40A(3) of the Act could not have been made for the reason that the business expediency was not covered in the circumstances enumerated in Rule 6DD of the Income Tax Rules, 1962.

15. As for the alternate contention of the Revenue that the assessee was unable to prove business expediency, we are

unable to agree with the same also. The assessee had contended that the land owners from whom land was purchased by the assessee and cash paid in lieu thereof, were all females and were in urgent need of funds and insisted the assessee to pay the consideration in cash and it was in these circumstances that the assessee made the payment in cash in excess of the limits specified u/s 40A(3) of the Act. The fact that the sellers of the land were females is confirmed by the copies of agreement to sell, which we find has not been controverted by the Revenue also. It is quite normal for females to insist on payment in cash considering the socio-economic background of the females in our country. Thus, we find no reason to doubt the business expediency for incurring the transaction in cash and this contention of the Revenue is also dismissed.

In view of the above, considering the various judicial decisions, we hold that the genuineness of the transaction not being doubted and business expediency being established, no disallowance u/s 40A(3) was warranted and the same is, therefore, directed to be deleted.

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

Order pronounced in the Open Court.

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Dated : 17th July, 2018

Rati

Copy to:

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

Assistant Registrar,
ITAT, Chandigarh