

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "D" KOLKATA*

Before **Shri P.M.Jagtap, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1741-1742/Kol/2017 Assessment Years:2012-13 & 2013-14

ACIT, Circle-1, "Sahana Apartment", Lower Chelidanga, Asansol-713304	<u>बनाम</u> / <u>V/s.</u>	Sri Tushar Kanti Banerjee, M/s Rambandh C.S. Shop, Rambadh, P.O. Burnpur, Dist. Burdwan, Pin 713325 [PAN No.AHSPB 1846 N]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	None
राजस्व की ओर से/By Respondent	Shri A. Bhattacharjee, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	26-07-2018
घोषणा की तारीख/Date of Pronouncement	29-08-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These two Revenue's appeals for assessment years 2012-13 & 2013-14 arise against the Commissioner of Income Tax (Appeals)-Asansol's separate orders; both dated 31.05.2017 passed in case No.s 115/CIT(A) /SL/ACITCir-1/Asl/15-16 & 230/CIT(A)/ASL/Wd-1(2)/Asl/15-16; both dated 31.05.2017, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Case called twice. None appears at the assessee's behest. The Registry has already sent RPAD notice(es); dated 02.07.2018. We accordingly proceed *ex parte*.

2. It emerges at the outset that the Revenue's sole substantive grievance identically pleaded in the instant two appeals seeks to restore Assessing Officer's action invoking section 40A(3) disallowances of ₹2,52,77,125/- and ₹99,63,303/- (assessment year-wise) alleging cash payments in violation of specified modes for purchasing country spirit from payee M/s Asansol Bottling & Packaging Co Ltd. Learned Departmental Representative vehemently contends during the course of hearing that CIT(A) has erred in law as well as on facts in deleting the impugned disallowance with the following detailed discussion:-

"3. DECISION: The only issue in this case is disallowance made by the AO us 40A(3) on account of purchase of Country Spirit in cash. The assessee has filed the detailed submissions and has argued that the issue is covered by the decision of the Hon'ble jurisdictional Tribunal in the case of Pushplata Mondal in ITA No.965/Kol/2010, dated 28.07.2011. The assessee has purchased Country Spirit from Asansol Bottling & Packaging Co. Pvt. Ltd for the value of Rs.25277125/- which was disallowed by the AO u/s 40A(3)

I have gone through the submissions of the assessee and the findings of the AO. The issue under consideration has been decided in favour of the assessee by a number of decisions given by the Hon'ble Jurisdictional Tribunal.

This issue is covered by the decision of the Jurisdictional Tribunal in Bolkunda Pachwai & (S) C.S. Shop case in ITA No.s 165 & 1665/Kol/2014 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 the 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 supplying or selling country spirit by wholesale has been granted under section 22 of the Act, or of a licensed wholesale vendor of country spirit.*

The above definition makes it clear that the '**Warehouse**' referred to under the State Excise Rules is under the direct control and authority of the Commissioner of State Excise because it is established by the Commissioner of State Excise and as such is a State Government establishment. It is also pertinent to note that the expenditure in relation

to such warehouse is borne by the State Government or by the licensee to whom the exclusive privilege is granted 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 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 within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner.

Hence, it could be safely concluded that M/s Asansol Bottling & Packaging Co. Pvt. Ltd. (Bottling Plant) is a warehouse within the meaning of Rule 2(vii) of the Excise Rules 2005 and said warehouse is a State Government establishment, established and controlled by the Excise Commissioner. It would be relevant to reproduce Rule R6DD(b) of the IT Rules at this juncture:-

(b) Where the payment is made to the Government and under the rules framed by it, such payment is required to be made in legal tender.

In the instant case, the assessee (retail vendor) had made cash payments for purchase of country spirit by depositing cash directly into the bank account of M/s ABPL as per Rule 6(2) of the Excise Rules 2005, it has to be construed as payment made to the State Government authority and accordingly falls under the exception provided in Rule 6DD(b) of the IT Rules.

It is not in dispute that M/s Asansol Bottling & Packaging Co. Pvt Ltd has been granted license to act as a wholesaler for supply of country liquor to the retail vendor as per the regulations of the Excise Department, Government of West Bengal. At the cost of repetition, we would like to state that the said regulation mandated the payments to be made directly into the bank account of the said wholesale licensee by the retail vendor (i.e. assessee herein) for strict and effective regulation of the country liquor and for prevention of spurious stocks and black marketing transactions form the same. Hence it could be safely concluded that the said wholesale licensee had acted at the instance of the State Government. Once this is so, then the said wholesale licensee could be construed as an agent of the State Government. For the sake of convenience, the relevant rule is reproduced hereunder:-

'Rule 6DD(k)- where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person.

*The payment made by the assessee retail vendor to the principal, Government of West Bengal through its wholesale agent. The relationship between the assessee (athorized retailer) and Government of West Bengal (the supplier) acting under W4est Bengal Excise Rules through its Authorized Wholesaler Licensee (Agent), both de facto and demure, is one of '**Principal**' and '**Agent**'. We hold that the assessee retail vendor had made payment to the said agent (wholesale licensee) would fall under the exception provided in Rule 6DD(k) of the Rules.*

The Ld. Authorized 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 6DD(a) of the Rule. We find that the assessee had made payments only to the customer of State Bank of India and not to State Bank of India. Hence the assessee's case does not fall under the exception provide in 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 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.

The facts of the case are similar regarding disallowance u/s. 540A(3). I am of the opinion that the issue under consideration is covered by the decision of jurisdictional Tribunal as discussed above. Respectfully following the above decision, the appeal of the assessee is hereby allowed. The disallowance made under section 40A(3) of Rs.25277125/- is hereby deleted.”

3. We have given our thoughtful consideration to Revenue's grievance . The same is found to be devoid of merit as the above co-ordinate bench has concluded qua the very payee that it falls within the exception provided in Rule 6DD(k) of the Income Tax Rules since acting as agent of the Government of West Bengal (principal). No exception on facts or law has been pointed out at the Revenue's behest during the course of hearing.

We therefore uphold the CIT(A)'s findings in both these appeals.

4. These two Revenue's appeals are dismissed.

Order pronounced in open court on 29/08/2018

Sd/-
(लेखा सदस्य)
(P.M.Jagtap)
Accountant Member
*Dkp-Sr.PS

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

दिनांक:- 29/08/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Sri Tushar Kanti Banerjee, M/s Rambandh C.S. Shop,
Rambandh, PO. Burnpur, Dist. Burdwn, Pin-713325
2. राजस्व/Revenue-ACIT, Circle-1, "Sahana Apartment" Lower Chelidanga,
Asansol-713304
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary,
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता