

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri A T Varkey, JM, & Shri M.Balaganesh, AM]

I.T.A No. 398/Kol/2017

Assessment Year : 2009-10

Subhash Ghosh  
[PAN: ADLPG 7889 H ]  
(Appellant)

-vs- ACIT, Circle-38, Midnapore.  
(Respondent)

For the Appellant : Shri Ravi Tulsiyan, FCA

For the Respondent : Shri Robin Chowdhury, Addl. CIT Sr. DR

Date of Hearing : 09.10.2018

Date of Pronouncement : 24.10.2018

**ORDER**

**Per M.Balaganesh, AM**

1. This appeal by the Assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals)-11, Kolkata [in short the Id CIT(A)] in Appeal No. 84/CIT(A)-11/ACIT, Range-1/MID/14-15/Kol dated 16.11.2016 against the order passed by the DCIT, Circle-1, Midnapore [ in short the Id AO] under section 144(3) of the Income Tax Act, 1961 (in short “the Act”) dated 05.12.2011 for the Assessment Year 2009-10.

2. The first issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the disallowance made in the sum of Rs 9,08,882/- u/s 40A(3) of the Act in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is a civil contractor and had filed his return of income for the Asst Year 2009-10 on 27.9.2009 declaring total income of Rs 26,74,450/-. The Id AO during the course of assessment proceedings observed that the assessee had made payments frequently for purchase of building materials for the purpose of construction. He purchased sand, morrom and boulders from the agents of the suppliers. The payments were made to the agents in cash in instalments in violation of provisions of section 40A(3) of the Act in the sum of Rs 9,08,882/-. The Id AO did not doubt the genuineness of expenditure incurred by the assessee and he also accepted that the payments were made for business purposes only as the suppliers had also duly acknowledged the receipt of monies in cash against cost of materials from the assessee through the agents of suppliers. However, he held that since the payments were made in cash in excess of Rs 20,000/- , he disallowed a sum of Rs 9,08,882/- u/s 40A(3) of the Act in the assessment. This was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

4. We have heard the rival submissions. We find that the genuineness of expenditure incurred in cash is not in dispute by the revenue in the instant case. The incurrance of such expenditure for the purpose of business is also not in dispute. We find that the payments were made through the agents of suppliers and hence the same would not fall under the exceptions to Rule 6DD of the IT Rules. In our considered opinion, the primary object of enacting section 40A(3) were two folds, firstly, putting a check on trading transactions with a mind to evade the liability to tax on income earned out of such transaction and, secondly, to inculcate the banking habits amongst the business community. Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequence, which were to fall on account of non-observation of Section 40A(3) must have nexus to the failure of such object. Therefore, the genuineness of the transactions being free from vice of

assessment any device of evasion of tax is relevant consideration. In this regard, it is pertinent to through light on the following decisions on the impugned subject:

- *Attar Singh Gurumukh Singh vs. ITO reported in [1991] 191 ITR 667 (SC):*

*“Section 40A(3) of the Income Tax Act, 1961, which provides that expenditure in excess of Rs. 2,500 (Rs. 10,000 after the 1987 amendment) would be allowed to be deducted only if made by a crossed cheque or crossed bank draft (except in specified cases) is not arbitrary and does not amount to a restriction on the fundamental right to carry on business. If read together with Rule 6DD of the Income-tax Rules, 1962, it will be clear that the provisions are not intended to restrict 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 upon to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of income from undisclosed sources. The terms of section 40A(3) are not absolute. Consideration 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 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 business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions. ”*

- *CIT vs Crescent Export Syndicate, reported in [2013] 216 Taxman 258, Calcutta High Court:*

*"It also appears that the purchases have been held to be genuine by the learned CIT(Appeal) but the learned CIT(Appeal) has invoked Section 40A(3) for payment exceeding Rs.20,000/- since it is not made by crossed cheque or bank draft but by hearer cheques and has computed the payments falling under provisions to Section 40A(3) for Rs. 78,45,580/- and disallowed @ 20% thereon Rs.15,69,116/-. It is also made clear that without the payment being made by bearer cheque these goods could not have been procured and it would have hampered the supply of goods within the stipulated time. Therefore, the genuineness of the purchase has been accepted by the Id. CIT(Appeal) which has also not been disputed by the department as it appears from the order so passed by the learned Tribunal. It further appears from the assessment order*

*that neither the Assessing Officer nor the CIT(Appeal) has disbelieved the genuineness of the transaction. There was no dispute that the purchases were genuine. "*

The assessee being a contractor frequently purchased building materials from various suppliers through their agents. The agents have flexibility to the assessee to make payments in installments. However, for giving such facility they required payments to be made in cash only. The ld AR argued that in construction business, it is difficult for the contractors to make lumpsum payments upfront at the time of purchase because there is a dearth of liquid money in their hands when the construction work is in progress. In view of such peculiar circumstances, the assessee was compelled to make cash payments in excess of Rs 20,000/-. In the instant case, the assessee had also established the circumstances under which the payment in the manner prescribed in section 40A(3) of the Act was not practicable or would have caused genuine problems and hence the business expediency is proved beyond doubt. This has not been controverted by the ld DR before us.

4.1. In view of the aforesaid observations in these peculiar facts and circumstances of the case and respectfully following the judicial precedents relied upon hereinabove, we direct the ld AO to delete the disallowance made u/s 40A(3) of the Act in the sum of Rs 9,08,882/-. Accordingly, the Revised Grounds 2(a) and 2(b) raised by the assessee are allowed.

5. The last issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the disallowance made u/s 40(a)(ia) of the Act in the sum of Rs 3,84,922/- on account of carriage inwards, in the facts and circumstances of the case.

6. The brief facts of this issue are that the assessee had paid total amount of Rs 17,14,620/- as carriage inwards. The ld AO observed that in respect of the following

parties, the payments made were more than Rs 50,000/- in a whole year. But no deduction of tax as required u/s 194C of the Act was done by the assessee:-

Bidyut Mahato	Rs 1,11,100/-
Nagendra Nath Maity	Rs 1,11,450/-
Soumen Kr Das	Rs 1,62,372/-
Total	Rs 3,84,922/-

This was disallowed by the Id AO u/s 40(a)(ia) of the Act in the assessment. This was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

7. We have heard the rival submissions. We find that the Id AR argued that the payees have duly included the subject mentioned receipts in their returns and had paid taxes thereon which may be verified by the Id AO. The Id DR also fairly agreed for the same. In view of the amendment to second proviso to section 40(a)(ia) read with section 201(1) of the Act, if the payees have included the subject mentioned receipts in their returns and paid taxes thereon, if any, then the disallowance u/s 40(a)(ia) of the Act would not operate in the hands of the payer. This second proviso though introduced by the Finance Act 2012 w.e.f. 1.4.2013 had been held to be retrospective in operation by the Hon'ble Jurisdictional High Court in the case of Principal CIT vs Tirupati Construction – GA No. 2146 of 2016 with ITAT No. 287 of 2016 dated 23.8.2016. Hence in the interest of justice and fairplay, we deem it fit and appropriate, to remand this issue to the file of the Id AO for denovo adjudication of the issue in the light of second proviso to section 40(a)(ia) of the Act. The assessee is also given liberty to adduce fresh evidences in support of its claim before the Id AO. Accordingly, the Revised Grounds 3(a) and 3(b) raised by the assessee are allowed for statistical purposes.

8. The Revised Grounds 1 & 4 raised by the assessee are general in nature and does not require any specific adjudication.

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

**Order pronounced in the Court on 24.10.2018**

Sd/-  
[A T Varkey]  
Judicial Member

Sd/-  
[ M.Balaganesh ]  
Accountant Member

Dated : 24.10.2018

SB, Sr. PS

Copy of the order forwarded to:

1. Subhash Ghosh, A-34, Burdgetown, Midnapore-721101, Paschim Medinipur.
2. ACIT, Circle-38, Midnapore, Amarabati Lodge, Keranitola, Midnapore-721101, Paschim Medinipur.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches