IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 5294/DEL/2013
[Assessment Year: 2006-07]

&
ITA No. 2403/DEL/2014
[Assessment Year: 2007-08]

Lord Krishna Dwellers (P) Ltd. 1711, S.P. Mukerjee Marg Delhi AABCL0602M	Vs.	DCIT Central Circle-4 New Delhi
[Appellant]		[Respondent]

Date of Hearing : 04.12.2018
Date of Pronouncement : 17.12.2018

Assessee by : Dr. Rakesh Gupta, Adv.
Shri Somil Aggarwal, Adv

Revenue by : Shri J. K. Mishra, CIT(A)-DR

ORDER

PER N.K. BILLAIYA, AM:-

The above captioned two appeals by the assessee are preferred against the two separate orders of the Commissioner of Income Tax [Appeals] – XXXIII, New Delhi dated 24.12.2013 pertaining to assessment years 2006-07 & 2007-08 respectively. Since common facts are involved in both these appeals and pertain to same assessee, they were heard together and are being disposed of by this common order for the sake of convenience and brevity.

ITA No. 5294/DEL/2013 [A.Y : 2006-07]

2. The assessee has challenged the validity of the assumption of jurisdiction for framing assessment u/s 153A of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short]. The assessee contends that the Assessing Officer has framed the assessment u/s 153A of the Act without bringing any incriminating material found during the course of search and seizure operation u/s 132 of the Act.

3. Facts on record show that a search operation was conducted at the premises of the assessee on 21.01.2011. Original return of income was filed on 21.11.2006 and the assessment was framed u/s 143(3) of the Act vide order dated 13.05.2008. This means that the assessment was completed on the date of search. This means that a completed assessment can be reopened u/s 153A of the Act and assessment can be framed if, and only if, some incriminating material is found during the course of search operation. The law is well-settled on this point by the decision of the Hon'ble Jurisdictional High Court in the case of Kabul Chawla 281 CTR 0045 [Del] which was followed in the case of Meeta Gutgutia 82 Taxmann.com 287.

4. Let us now consider the documents seized during the course of search and let us find out whether the same can be considered as incriminating material, enabling the Assessing Officer to proceed u/s 153A of the Act.

5. During the course of search operations, several sale deeds were seized which related to the purchases of land aggregating to Rs. 4.01 crores for the year under consideration. From these sale deeds, the

Revenue came to know that an amount of Rs. 1.05 crores has been paid to various persons in cash. Since the payments were made in cash, the Assessing Officer was of the firm belief that the provisions of section 40A(3) of the Act squarely applied.

6. All that we have to consider is as to whether these sale deeds constitute incriminating material to trigger the provisions of section 153A of the Act. There is no dispute that the purchases of land reflected in the seized sale deeds are duly recorded in the regular books of account. There is no dispute in relation to the sources of payments made for purchases of land. As mentioned elsewhere, the assessment was framed u/s 143(3) of the Act vide order dated 13.05.2008. During the course of original scrutiny assessment proceedings, the assessee has furnished the following reply:

"May 12, 2008

The Deputy Commissioner of Income Tax,
Circle 4(1), C R Building,
New Delhi

Sir,

Sub: Notice tinder Section 143 (2)/ 115WE(2) of I.T. Act, 1961 in the matter of M/s Lord Krishna Dwellers Private Limited for Assessment year 2006-2007 Ref: Your Notice dated 01.02.2008

This has reference to our discussion on 25.04.2008 on captioned matter, wherein you had asked us for submitting certain documents and requiring us to appear in person before your .good self on 12.05,2008.

(1) A list of comparison between purchased cost of property acquired and circle rate of property acquired as per prevailing circle rate along with circle rate list is enclosed herewith as Annexure A.

2) Details of vendors from whom land was purchased during the financial year 2005- 2006 is enclosed herewith as Annexure B. We are also producing copies of land deed for your verification.

We hope that you will find all above in order to your requirement.

Thanking You,

Yours Sincerely,
For Lord Krishna Dwellers Pvt. Ltd.

Anil Kuamr Sarswat
Authorized Signatory

Siddhartha Goel
Authorized Signatory"

7. It can be seen from the above reply that the details of vendors from whom the land was purchased during the F.Y. 2005-06 alongwith copies of land deed were furnished for verification. After considering all this, the Assessing Officer framed assessment.

8. The same sale deeds were found during the course of search operation and on the basis of the very same sale deeds, the Assessing Officer came to the conclusion that an amount of Rs. 1.05 crores has been paid to various persons in cash. In our considered opinion, the sale deeds, transactions when duly recorded in the regular books of account, cannot be considered as incriminating material found during the course of search operation. It is not the case of the Revenue that if the search and seizure operation had not been conducted, the Revenue could never have come to know that the assessee has entered into various purchase transactions of land.

9. The ld. DR vehemently stated that though the deeds were before the Assessing Officer, but he examined the deeds only to ascertain the circle rate vis a vis the transaction rate and never went into the cash

transactions reflected in the land deed. This contention of the ld. DR is not acceptable. Once a document is filed before the Assessing Officer during the course of search proceedings it is assumed that he has gone through the contents of those documents and has verified the same. It may be that the assessment framed u/s 143(3) of the Act is silent on this aspect but as held by the Hon'ble Gujarat High Court in the case of Nirma Chemical Works 309 ITR 67 that if the assessment order were to incorporate reasons for upholding the claim made by an assessee, result would be an epitome and not an assessment order.

10. For the sake of conclusiveness, we have examined each and every sale deed which was filed by the Revenue in its paper book with details of transaction filed by the assessee during the course of scrutiny assessment proceedings. After due verification, we find that the copies of sale deed filed by the Revenue are the same which were considered by the Assessing Officer while framing assessment u/s 143(3) of the Act.

11. It would be pertinent to refer to the findings of the Hon'ble Delhi High Court in the case of Kabul Chawla [supra] which reads as under:

"The decision in CIT Vs. Anil Kumar Bhatia does not deal with a situation where, as in the present case, no incriminating material was found during the search conducted u/s 132

Nevertheless, it was interesting to note that in CIT Vs. Chetan Das Lachman Das the court underscored the need for department to have unearthed material during the search to justifying the assessment sought to be made. It was held that an assessment u/s 153A has to be made under this section only on the basis of seized material.

On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

(i) Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

(iii) The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

(iv) Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

(v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

(vi) Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

(vii) Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

12. A similar view was taken by the Hon'ble jurisdictional High Court in the case of Meeta Gutgutia reported in 395 ITR 526.

13. Considering the facts of the case in totality in the light of the judicial decisions discussed hereinabove, we have no hesitation to hold that the assessment framed u/s 153A of the Act is bad in law and deserves to be quashed.

14. Since we have set aside the assessment itself, we do not find it necessary to dwell into the merits of the case.

15. Before closing, we have to point out that the ld. DR has placed reliance on the decision of the Supreme Court in the case of Mukundray K. Shah 290 ITR 433. We find that the facts of this case are clearly distinguishable from the facts of the case in hand in as much as in that case, the Revenue came to know about the transaction, triggering the provisions of section 222e of the Act from the diary found during the search proceedings. Whereas in the case in hand, the sale deeds found at the time of search were same sale deeds which were considered by the Assessing Officer at the time of assessment proceedings u/s 143(3) of the Act.

ITA No. 2403/DEL/2014 [A.Y. 2007-08]

16. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in confirming the disallowance of Rs. 6.80 lakhs made u/s 40A(3) of the Act.

17. Briefly stated, the facts of the case are that during the search proceedings, sale deeds were found which contained transactions of purchase of land aggregating to 1.11 crores from various persons. From the sale deeds, the Assessing Officer found that an amount of Rs. 34 lakhs has been paid to various persons in cash. Invoking the provisions of section 40A(3) of the Act, 20% of the said cash payment was added amounting to Rs. 6.80 lakhs.

18. The assessee carried the matter before the ld. CIT(A) but without any success.

19. Before us, the ld. counsel for the assessee stated that the transactions found in the sale deeds are duly recorded in the regular books of account of the assessee and the Assessing Officer has not pointed out any defect in the said transactions. It is the say of the ld. counsel for the assessee that the Assessing Officer has neither doubted the genuineness of the transaction nor he has doubted the identity of

the payees. Therefore, mechanical invocation of provisions of section 40A(3) of the Act is uncalled for and the additions should be deleted.

20. Per contra, the ld. DR strongly supported the findings of the Revenue authorities. It is the say of the ld. DR that application of section 40A(3) is mandatory and if there is a violation of the said provision, then, the Assessing Officer is bound to make additions as per law.

21. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that the purchases of land are duly recorded in the books of account of the assessee. There is also no dispute that the payees were identified from the sale deeds itself and the transactions have been held to be genuine. In our understanding, since the genuineness of the payments and identity of the payees is not doubted by the Revenue, the provisions of section 40A(3) of the Act could not be made mechanically. In our considered opinion, the

intention behind introduction of provisions of section 40A(3) of the Act has to be looked into.

22. This provision was inserted by the Finance Act, 1968 with the object of curbing the expenditure in cash and to counter tax evasion. The CBDT Circular No 6P dated 6.7.1968 reiterates this view that this provision is designed to counter evasion of a tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the department as to the identity of the payee and reasonableness of the payment.

23. In this regard, it is pertinent to get into the following decisions on the impugned subject:

Attar Sinsh Gurmukh Singh vs ITO reported in (1991) 191 ITR 667 (S.C)

"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 practicableor 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 CPL Tannery reported in (2009) 318ITR 179 (Cal)

The second contention of the assessee that owing to business expediency, obligation and exigency, the assessee had to make cash payment for purchase of goods so essential for carrying on of his business, was also not disputed by the AO. The genuinity of transactions, rate of gross profit or the fact that the bonafide of the assessee that payments are made to producers of hides and skin are also neither doubted nor disputed by the AO. On the basis of these facts it is not justified on the part of the AO to disallow 20% of the payments made u/s 40A(3) in the process of assessment. We, therefore, delete the addition of Rs. 17,90,571/- and ground no.l is decided in favour of the assessee.

CIT vs Crescent Export Syndicate in ITA No. 202 of 2008 dated 30.7.2008 - Jurisdictional High Court decision

"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. "

Anupam Tele Services vs ITO in (2014) 43 taxmann.com 199 (Gui)

"Section 40A(3) of the Income-tax Act, 1961, read with rule 6DD of the Income-tax Rules, 1962 - Business disallowance - Cash payment exceeding prescribed limits (Rule 6DD(j)-Assessment year 2006-07 - Assessee was working as an agent of Tata Tele Services Limited for distributing mobile cards and recharge vouchers - Principal company Tata insisted that cheque payment from assessee's co-operative bank would not do, since realization took longer time and such payments should be made only in cash in their bank account - If assessee would not make cash payment and make cheque payments alone, it would have

received recharge vouchers delayed by 4/5 days which would severely affect its business operation - Assessee, therefore, made cash payment - Whether in view of above, no disallowance under section 40A (3) was to be made in respect of payment made to principal - Held, yes [Paras 21 to 23] [in favour of the assesse]"

Sri Laxmi Satvanaravana Oil Mill vs CIT reported in (2014) 49 taxrnann.com 363 (Andhra Pradesh High Court)

"Section 40A{3) of the Income-tax Act, 1961, read with Rule 6DD of the Income-tax Rules, 1962 - Business disallowance - Cash payment exceeding prescribed limit (Rule 6DD) - Assessee made certain payment of purchase of ground nut in cash exceeding prescribed limit - Assessee submitted that her made payment in cash because seller insisted on that and also gave incentives and discounts - Further, seller also issued certificate in support of this - Whether since assessee had placed proof of payment of consideration for its transaction to seller, and later admitted payment and there was no doubt about genuineness of payment, no disallowance could be made under section 40A(3) - Held, yes [Para 23] [In favour of the assessee]"

CIT vs Smt. Shelly Pas si reported in (2013) 350ITR 227 (P&H)

In this case the court upheld the view of the tribunal in not applying section 40A(3) of the Act to the cash payments when ultimately, such amounts were deposited in the bank by the payee."

24. From the afore stated judicial decisions, it can be found that the primary object of enacting section 40A(3) of the Act was two-fold – firstly, putting a check on trading transactions with a mind to evade the liability of tax on income earned out of such transaction, and secondly, to inculcate the banking habits amongst the business community. In our understanding, this provision was directly related to curb evasion of tax and inculcating banking habits. Therefore, once the genuineness of the transaction is accepted and the payees are identified, then the intention of inserting the provisions of section 40A(3) of the Act is fulfilled. Considering the facts of the case in totality in the light of the judicial decisions discussed hereinabove, we do not find any merit in the additions made by the Assessing Officer. We, accordingly, direct the Assessing Officer to delete the addition of Rs. 6.80 lakhs.

25. In the result, both the appeals of the assessee in ITA No. 5294/DEL/2013 and 2403/DEL/2014 are allowed.

The order is pronounced in the open court on 17 .12.2018.

Sd/-	Sd/-
[KULDIP SINGH]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th December, 2018

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the approved draft comes to the	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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