

**आयकर अपीलिय अधिकरण, सुरत न्यायपीठ, सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**  
**श्रीमती दिवा सिंह, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No. 2776/Ahd/2015	निर्धारण वर्ष/A.Y.:2012-13
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Shri Nilesh Bhagwanbhai Bodara, B/9, Panchdev Society, B/h Shirdidham Society, Varachha Road, Surat - 395006. [PAN: AJOPB 7399 G]	Vs.	Income Tax Officer, Ward - 3(3)(3), Surat.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Hiren R. Vepari, CA
राजस्व की ओर से /Revenue by	Shri P.S. Chaudhary, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	10.01.2019
उद्घोषणा की तारीख/Pronouncement on:	25.01.2019

**आदेश /O R D E R**

**PER O. P. MEENA, ACCOUTANT MEMBER:**

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-3; Surat (in short "the CIT (A)") dated 31.07.2015 for the Assessment Year 2012-13.
2. Ground No. 1 relates to confirming the disallowance of Rs.8,38,067/- made under section 40A(3) of the Act.
3. Facts apropos of this ground are that the assessee has made certain cash purchases exceeding Rs.20,000/- each clubbed in 6 number of bills and vouchers amounting to Rs. 8,38,067 on six occasion as mentioned in the table of assessment order. Accordingly, the AO has invoked the provisions of section 40A(3) of the Act and made disallowance of the same.
4. The assessee has carried the matter before CIT(A). After going through the purchase ledger submitted by the appellant, the CIT(A) observed that ledger does not depict the correct and actual state of affairs. The assessee has shown purchases on 04.04.2011 from 14 parties of which purchase rate is shown at Rs.8411.47 per carats and which is same for all 14 parties which shows that transaction are concocted. It may be noted that polished diamonds differs greatly in qualities, and it is

impossible to find exactly same quality from different sellers that too on single day. Surprisingly on each of the five days, the purchases are shown, on similar pattern. For example, the rate of purchases from each of the 12 parties is exactly same i.e. Rs. 18304.98 per carats for purchase of diamond made on 24.02.2012 which were claimed to be below Rs. 20,000. Further, the purchases are not verifiable and hence, estimated disallowance are required to be made if entire disallowance was not made under section 40A(3) of the Act. The CIT (A) therefore, confirmed the disallowance made under section 40A(3) of the Act.

5. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee draw our attention to Paper Book Page No. 12 and 13 which gives details of purchase made in cash and claimed that none of the purchases made is exceeding Rs.20,000/- each, therefore, provisions of section 40A(3) are not attracted. The rate of purchase remains same in respect of various vendors as purchases were made from street vendors in assorted parcels. As a result of the disallowance of 30%, the profit shown by the assessee becomes 100%, which is not permissible. The learned counsel for the assessee also placed reliance in the case of CIT v. Kothari Sanitation & Tiles (P) Ltd. (2006) 202 CTR (Mad) 277 and Honey enterprise v. CIT [2016] 381 ITR 258 (Delhi) in support of his contentions. Hence, CIT (A) was not justified in confirming 100% disallowance. It was urged before us that some estimate @5% of purchases should have been disallowed.

6. *Per contra*, the ld. Sr. D.R. submitted that the assessee has is not able to prove that purchases shown on various dates were made from different parties as the purchase rate shown on each date is same which is not possible in respect of polished diamonds. The cash vouchers are also made single in respect of purchase made on single date. If the purchases were made from different parties, how could be single cash vouchers could be made. Therefore, the lower authorities were justified in making disallowance under section 40A(3) of the Act.

7. We have heard the rival submissions and perused the relevant material on record. We find that the purchases are claimed to be made from various parties of which single purchases does not exceeded Rs.20,000/- in cash. Hence, provisions of section 40A (3) are not strictly applicable as observed by the ld. CIT (A) also. We find that the AO has disallowed the purchases but does not doubt the sales made against such purchases. Therefore, it would be unfair and unreasonable to treat the entire amount of purchases as income of the assessee. Because, when

the sales of the assessee have not been doubted by the AO. Then the entire amount of unverifiable cash purchases of the assessee cannot be considered as income of the assessee. We find support for the judgement of the Honourable Gujarat High Court in the case of *Mayank Diamonds Pvt. Ltd. v. ITO* [Tax Appeal No. 200 of 2003] dated 17.11.2014 [2014] 11 (TMI) 812 (Gujarat) wherein their Lordship have laid down the ratio that addition on allegation of bogus purchases has to be made based on gross profit rate of 1 to 5% of total alleged disputed purchases. We find that the assessee had maintained the quantity stock of diamonds purchases and sold, which has not been disputed by the AO, thus the entire amount of purchases cannot be added to the total income. In our humble understanding of the provisions of the Act and nature of commercial transactions, the element of profit of alleged purchases may be made to cover up the possible leakages of Revenue and it also serve the purpose of entire exercise undertaken by the tax authorities. Therefore, we are inclined to restrict the disallowance @5% of total cash purchases disallowed of Rs.8,38,067/- under section 40A(3) of the Act. Accordingly, disallowance of purchases are restricted to 5% which comes to Rs.41,903/- and balance disallowance of purchases of Rs.7,96,164/- is deleted. Consequently, this ground of the appeal of the assessee is partly allowed.

8. Ground No. 2 relates to confirming action of the AO in making disallowance of Rs.2,98,898/- being interest paid on loans.

9. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that as per Profit & Loss Account placed at PB-59, the assessee has claimed interest of Rs.2,98,898/- as interest on loans since amount borrowed was utilized for real estate business. The assessee has filed details before CIT (A) which have been discussed by CIT (A) in para 4 to 6 to demonstrate that the assessee always engaged into the business of real estate alongside trading into polished diamonds. The learned counsel for the assessee referred Paper Book Page No. 14 to 16 and submitted that the assessee has purchased plot of land during the year under consideration and sold the plot of land after plotting of land in different plots (PB-18 to 21). Therefore, CIT (A) was not justified in confirming the disallowance of interest as the loan taken was utilized in real estate business carried on by the assessee.

10. *Au contraire*, the ld. Sr. DR relied on the orders of lower authorities.

11. We have heard the rival submissions and perused the relevant material on record. The perusal of Paper Book Page No. 14 to 16 and 4 to 6 manifest that the assessee was also engaged in the business of real estate for which the assessee has taken loans. Therefore, the loans and advances so taken cannot be said that same were not utilized for the purpose of business. Hence, disallowance of interest of Rs.2,98,898/- does not appear to be on sound basis. In view of this matter, we delete the same. This ground is therefore, allowed.

12. Ground No. 3 relates to confirming addition of Rs.92,500/- and Rs.1,88,000/- by treating the gifts as unexplained expense under section 68 of the Act.

13. Brief facts are that the AO has discussed this issue at para 6.1 to 6.6 of assessment order. The AO did not accept the explanation regarding gifts of Rs.92,500 received on 11.07.2011 at the time of baby shower and gifts of Rs.1,88,000 received from various relatives and friends on 13.11.201 as genuine. The AO observed that there is no documentary evidence and household withdrawals are shown at Rs.65,000/-. Therefore, the assessee is under dark cloud of suspicion.

14. In appeal, the CIT (A) observed that the assessee has been showing household withdrawals at Rs. 65,000 which gives average of Rs.6,000 per month whereas the assessee has shown gifts of Rs.92,500/- and Rs.1,88,000/-. Further, the gifts in our society are reciprocal and the assessee has not shown similar gifts given hence, the AO was right in disallowing the claim.

15. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned Counsel submitted that the assessee lives in joint family and under one roof and the expenses are borne by the family. The learned counsel for the assessee submitted that the assessee has informed that there was no function at all but since the child was born to him long time after marriage, these gifts were received. The amount of Rs.92,500/- was credited on 10.07.2011. The assessee has incurred expenses of Rs.18,000/- on 09.07.2011 as reflected in accounts. So far the amount of Rs.1,88,000/- is concerned was received at the time of birth of child. The birth of child took place at Antwerp, Belgium, where the wife of the assessee has gone for delivery at her father's place. The function if any was organized at Belgium. Therefore, there is no question

of any expenditure being incurred by the assessee. Therefore, it was contended that this particular aspect might be accepted.

16. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has claimed that no function for baby shower took place in India as the child was born in Belgium. Therefore, how the gifts could be received in cash in India is not understood. Further, the assessee has not filed any documentary evidence-showing name of person or relatives from whom the alleged gifts were received. In absence of such evidence on record, we do not find any infirmity in the order of CIT (A), accordingly, same is upheld. This grounds of appeal is therefore, dismissed.

17. In the result, the appeal of the assessee is partly allowed.

18. The order pronounced on 25-01-2019.

**Sd/-**  
**(DIVA SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(O.P.MEENA)**  
**ACCOUNTANT MEMBER**

Surat: Dated: 25<sup>th</sup> January 2019/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

/ / TRUE COPY / /

**Assistant Registrar, Surat**