

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत  
IN THE INCOME TAX APPELLATE TRIBUNAL  
SURAT BENCH, SURAT

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री  
ओ.पी.मीना, लेखा सदस्य के समक्ष  
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER  
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No. 2112/Ahd/2014 & I.T.A. No. 2135 /Ahd/2014	निर्धारण वर्ष/A.Y.:2007-08 & A.Y. 2008-09
--	--

Shri Anand Kumar Joshi 407 Manoj Market Ring Road Surat 395002 PAN: AELPJ2447K	Vs.	Income Tax Officer, Ward- 2(2) Surat
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Mehul R. Shah, CA
राजस्व की ओर से /Revenue by	Shri R. P. Rastogi, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	17.04.2018
उद्घोषणा की तारीख/Pronouncement on	15.05.2018

**आदेश /O R D E R**

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

1. These two appeals by the Assessee are directed against the two separate orders of learned of Commissioner of Income tax (Appeals) II Surat (in short the CIT (A)) dated 29.04.2014 for the assessment year 2007-08 and order dtd. 16.05.2014 for assessment year 2008-09.

**I.T.A. No. 2112/Ahd/2014/A.Y. 2007-08**

**2.** Ground no. 1 & 2 states that the Ld.AO erred in passing order under section 154 read with section 254 of the Act without providing any opportunity of being heard to the assessee as required under section 154 (3) of the Act, therefore, it is prayed that order passed by the AO under section 154 read with section 254 of the Act may please be quashed.

**3.** Succinct facts are that the assessment for assessment year 2008-09 was completed under section 143(3) of the Act by making disallowance of total payments Rs. 58, 29, 830 u/s. 40A(3)(a) and Rs. 2, 68, 66, 115 under section 40A(3)(b) of the Act respectively. As the assessee not brought any explanation on record as to whether there was any business expediency or exceptional and unavoidable circumstances necessitating such payments otherwise than by account payee cheques. Accordingly, disallowance of Rs. 58, 29, 830 was made under section 40A(3)(a) of the Act on account of payment for the purchases during the year and disallowance of Rs. 2, 68, 66, 115 was made under section 40A(3)(b) of the Act in respect of liability incurred in A.Y.

2007-08 and payments were made to creditors during the year under consideration out of opening balances brought forward.

The assessee went into appeal before CIT (A) but without any success. The assessee further filed an appeal before the Tribunal.

The Tribunal has set-aside the order of the Assessing Officer considering the plea of assessee that the assessee made payments through an agent who was required to make further payments in cash and that provisions of rule 6DD(k) was applicable. Accordingly, the order was set-aside for consideration the applicability of rule 6DD(k). The Tribunal has further directed that even if the AO finds that rule 6 DD (k) is not applicable, then disallowance under section 40A(3)(b) cannot be made in the assessment year under consideration i.e. assessment year 2008-09 for the reason that amendment brought in by Finance Act 2007 with effect from 01.04. 2008 will not be applicable for the assessment year 2008-09. The Tribunal had interpreted that amendment in the provisions of section 40 A (3)(b) will be

applicable in respect of expenditure incurred in assessment year 2008-09 and in subsequent years but will not be applicable in respect of liability of expenditure incurred in assessment year 2007-08.

4. The learned Counsel for the assessee submitted that in pursuance of the order of Tribunal, the assessment for assessment 2008-09 was made and disallowance @ 20% of Rs. 2,68,66,115 under section 40A(3)(b) for the assessment year 2007-08 is made by passing order under section 154 by observing that no notice under section 154 is required to be issued as the assessee has been heard while passing assessment order for the assessment year 2008-09 in set-aside proceedings. In view of that matter, the learned Counsel contended that the Assessing officer has passed an order under section 154 without providing an opportunity of hearing to the assessee as required under section 154 (3) of the Act. Therefore, it is urged before us that the rectification order passed in violation of natural Justice

should be quashed. The learned Counsel by placing reliance on the judgement of Hon`ble Punjab & Haryana High Court in the case of CIT v. Smt. Shelly Passi [2013] 350 ITR 227 (P&H) submitted that where the assessee has purchased goods and deposited cash directly in bank account of seller, no disallowance could be made in hands of payee -assessee. In the instant case, the payments by way of cross cheque were deposited in bank account of seller/ creditors hence, Rule 6DD (k) has no application. The learned counsel for the assessee further relied on the decision of Co-ordinate Bench of Kolkata tribunal in the case of Rampada Panda v. ITO [2016] 65 taxmann.com 213 (Kol-Trib) where the assessee has directly deposited the payments in the bank account of supplier PF which has acknowledged by concerned supplier by crediting it into ledger account of the assessee and genuineness of these payments had also not been doubted by revenue, provision of section 40A (3) could not be made applicable. In the case of the assessee, payments are not

doubted and held that payments were directly made by cross cheque to supplier/creditors. Hence, this case is squarely applicable to present facts of the case.

5. On the other hand, the learned senior Departmental Representative supported the order of the AO on the ground that the opportunity was provided during the course of assessment proceedings for assessment year 2008-09, hence, there was no need to provide further opportunity of being heard, while passing the order under section 154 of the Act.

6. We have heard the rival contentions. It is true from the fact and observation of the AO made in the body of order under section 154 that the rectification order under section 154 has been passed without giving an opportunity of being heard to the assessee. the provision of section 154 (3) reads as us under:-

(3) An amendment, which has the effect of enhancing an assessment<sup>68</sup> or reducing a refund or otherwise increasing the liability of the assessee <sup>69</sup>[or the deductor] <sup>70</sup>[or the collector], shall not be made under this section unless the authority concerned has given notice to the assessee <sup>69</sup>[or the deductor] <sup>70</sup>[or the collector] of its intention so to do

and has allowed the assessee <sup>69</sup>[or the deductor] <sup>70</sup>[or the collector] a reasonable opportunity of being heard.

7. Thus, plain reading of above provisions shows that an amendment which has effect of enhancing the liability shall not be made unless an opportunity of being heard is given to the assessee. Thus, the AO has not afforded opportunity of being heard for the order made under section 154 even though he may have provided opportunity for assessment year 2008-09. However, every year is different hence, the AO should have provided before passing the impugned order under section 154 of the Act with proper opportunity of being heard. The principle of *audi alteram partem* is the basic concept of natural justice. The expression “*audi alteram partem*” implies that a person must be given an opportunity to defend himself. This principle is *sine qua non* of every civilized society. The right to notice, right to present case and evidence, right to rebut adverse evidence, right to cross examination, right to legal representation, disclosure of evidence to party, report of enquiry to be shown to the other party and reasoned decisions or speaking orders are must. We find the guidance for right of hearing, as is laid down by the Hon'ble Supreme Court in the case of Maneka Gandhi v. Union of India, wherein Hon'ble Supreme Court has held that rule of fair

hearing is necessary before passing any order. We find that it is pre-decision hearing standard of norm of rule of *audi alteram partem*. We find that in this instant case, the assessee was not given proper hearing. Therefore, we are of the view that the assessee must be given one more opportunity of hearing and to represent his case. Therefore, in exercise of power conferred under Rule 28 of Tribunal Rules, we restore this appeal for any assessment year 2007-08 to the file of the Id. Assessing Officer for allowing proper opportunity of being heard in accordance with law. We find that the Hon`ble Punjab & Haryana High Court in the case of CIT v. Smt. Shelly Passi [2013] 350 ITR 227 (P&H) held that where the assessee has purchased goods and deposited cash directly in bank account of seller, no disallowance could be made in hands of payee -assessee. In the instant case, the payments by way of cross cheque were deposited in bank account of seller/ creditors hence, Rule 6DD (k) has no application. Further, the Co-ordinate Bench of Kolkata tribunal in the case of Rampada Panda v. ITO [2016] 65 taxmann.com 213 (Kol-Trib) where the assessee has directly deposited the payments in the bank account of supplier PF which has acknowledged by concerned supplier by crediting it into ledger account of the

assessee and genuineness of these payments had also not been doubted by revenue, provision of section 40A (3) could not be made applicable. . In the case of the assessee, payments are not doubted and held that payments were directly made by cross cheque to supplier/creditors. Hence, this case is squarely applicable to present facts of the case. This aspect was not examined by the AO while making scrutiny for the assessment year 2008-09. Hence, we direct the AO to examine this aspect in the light of ratio laid down in aforesaid judgements. Further. we also observe that the AO did not issue summons under section 131 to Shri Manoj Kumar Sharma, Agent, for examination even if the assessee has demanded. Therefore, the issue is set-aside to the file of the AO for allowing opportunity of being heard and examining the case in the lines as indicated above. Nevertheless, to mention that the assessee will cooperate in the appeal proceedings and file necessary evidences on which he wants to rely upon.

**8.** In the result, the appeal of the assessee for the A.Y.2007-08 in I.T.A. No. 2112/Ahd/2015 is allowed for statistical purposes.

**I.T.A. No. 2135/Ahd/2014/A.Y. 2008-09**

**9.** Ground no. 1 is states that on the facts and in circumstances of the case as well as in law on the subject, the learned CIT(A) has erred in confirming the action of the Assessing Officer in holding that assessee has made the payments of Rs. 3, 26, 95, 945/- in contravention of section 40 A (3) of Income Tax Act 1961, by rejecting the claim of the assessee that payments are covered under rule 6 DD(k).

**10.** Ground no. 2 states that the Id. CIT (A) has erred in confirming the action of the AO in making disallowance of Rs. 58,29,830 under section 40A(3)(a) of the Act as not covered by Rule 6DD(k).

**11.** Both ground are interlinked hence, as part of disallowance made are relates to A.Y. 2007-08 and part pertains to A.Y. 2008-09, being considered together. Succinctly facts are that the return of income for A.Y. 2008-09 was filed on 30.09.2008 declaring total income of Rs.3,31,140/- wherein original assessment was made under section 143 (3) on 27. 12. 2010 by making an disallowance of Rs. 58, 29, 830/- under section 40A(3)(a) and making disallowance of payments of Rs.2,68, 66,115/- under section 40A(3)(b). The assessee has filed appeal

before CIT (A) wherein a plea was made that payments were made through an agent Shri Manoj Sharma , who demanded cross cheques as he was required to make payments in cash hence, Rule 6DD(K) was applicable. However, this plea was rejected by CIT (A). The assessee further went in appeal before Tribunal, wherein vide order dated 18.11.2011 in I.T.A. No.1833/Ahd/2011/A.Y.08-09 has set-aside the issue to the file of the AO - by observing as under:

*“We are not satisfied on this aspect that merely cheques were issued in the name of suppliers, non-existence of agent is proved. Regarding furnishing of evidence also, we feel that in the interest of justice, one more opportunity should be provided to bring the required evidence on record and hence, we set-aside the order of Id. CIT (A) on both the issue i.e. regarding disallowance under section 40A (3) for both expenses incurred during the present year and also of the expenses incurred during earlier year or years to the file of the AO for fresh decision. The assessee has to bring required evidence on record in support of this*

*contention that there was an agent and the payments were made by the assessee as per the direction of the agent and hence, Rule 6DD(k) is applicable, After providing adequate opportunity to the assessee, the AO shall pass necessary order as per law on this aspect.”*

**12.** Thus, ITAT has restored the matter to the file of the Assessing officer for examining the applicability of rule 6 DD (k) for the addition of Rs. 58, 29, 830/-under section 40A(3)(a) of which payment was made during the financial year 2007-08 relevant to assessment year 2008-09 and the disallowance of Rs.2, 68,66,115/-being payment made out of opening balance as on 01.04.2007, with a direction that even if he finds that rule 6DD (k) is not applicable, then also, no disallowance or addition is called for in the present year i.e. A.Y. 2008-09 in respect of the payments of Rs. 2,68,66,115 as the same pertains to A.Y. 2007-08 in which the liability was incurred as per the provisions of section 40A(3) as applicable to assessment year 2007-08. It was further directed that the AO shall first decide the

applicability Rule 6DD (k) with regard to these payments also and if it is found that rule 6DD(k) is not applicable, even then also no disallowance is called for in the present year out of opening balance and the addition in this regard shall be made in that year, in which the liability was incurred by applying the provision of section 40A(3) which was applicable to the assessment year 2007-08. In the light of these directions of Tribunal, the AO passed the impugned assessment order under appeal. Before the AO, it was claimed that the payment was made through the agent named as Mr. Manoj Sharma, hence, payments are covered under Rule 6DD(k). In view of this matter, the AO asked to the assessee to produce Shri Manoj Sharma for examination vide letter dated 14.02.2013, but the assessee has failed to produce Shri Sharma on the ground that they are not dealing with him now, and asked the AO to issue summons him directly vide submissions dated 28.03.2013 as reproduced by the AO in the body of assessment order, but the AO did not chose to do so. The

assessee has also filed a confirmation Ltd. dtd. 30.05.2011 from Shri Manoj Sharma wherein it was contended that Shri Manoj Sharma has admitted that he has received cross cheques from the assessee for making cash payments to suppliers from whom the assessee has purchased goods. However, the AO concluded that there was no agent as claimed by the assessee. With regard the applicability of Rule 6DD (k), the AO noted that as per Rule 6DD (k) “the disallowance would not be made in a case, where the payments 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”, in the present case, the payments could not be made by agents as cheques issued by the assessee were deposited in different accounts. Hence, Rule 6DD (k) is not applicable. Accordingly, the AO proceeded to disallowance the amount of Rs. 58,29,830 under section 40A(3)(a) for the assessment year 2008-09 and Rs. 2,68,66,115 disallowance under section 40A(3)(b) for

the assessment year 2007-08 by way of passing order under section 154 of the Act.

**13.** Being aggrieved, the assessee filed an appeal before the ld. CIT (A). The CIT (A) noted that the AO has made disallowance of Rs.58,29,830 in A.Y. 2008-09 and disallowance @ 20% of payments of Rs. 2,68,66,115 in relation to A.Y. 2007-08 by passing order under section 154 of the Act. However, the assessee has challenged the disallowance of Rs. 58,29,830, but also challenged by way of additional ground for total amount of Rs. 3,26,95,945 considering in contravention of section 40A(3) of the Act. The CIT (A) observed that “Rule 6DD(k)-provides for exception to section 40A(3) that where the payments 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.” In the present case, the appellant has claimed that Mr. Manoj Sharma was his agent. However, cheques have not been issued by the assessee in favour of Mr. Manoj Kumar Sharma. The payments has been made

by cross cheque in favour of creditors/ suppliers and not in the name of Mr. Manoj Sharma. These cross cheques are not account payee cheques as required under section 40A (3) of the Act. There is no endorsement on backside of these cheques by the payee, which means that only a creditor/supplier of the appellant could authorize discounting of cheques through shroffs or could make endorsement. The so called agent, Mr. Manoj Sharma, has no authority to endorse such cheques or get them discounted through shroffs. Therefore, in the present case, it cannot be said that the appellant had made payments to Mr. Manoj Sharma, as he could not discounted the cheques or endorsed the cheques issued in the name of others parties. The CIT (A) further observed that the confirmation of Mr. Manoj Sharma says that he has obtained the cheques but it is fallacy as the cheques have been issued in the name of creditors /suppliers, hence, he could not get discounted of endorsed the cheques. Further, the appellant has not produced Mr. Manoj

Sharma for examination, nor the payment of commission charged @0.5% for the service, as agent has been debited by the assessee in its books of accounts. Therefore, the confirmation does not establish that Mr. Manoj Sharma was his agent. Even if it assumed that Mr. Manoj Sharma was his agent, even that payment is not covered by Rule 6DD (K) as it requires when the payment is made to agent. Here the cheques have been issued in the name of creditors/ suppliers. The CIT (A) also observed that if the appellant has made full amount by cross cheque to creditors and creditors have received payments after deduction of 0.5% commission, it means that the commission has been deducted from sale proceeds receivable by those parties. This in turn means that Mr. Manoj Sharma has acted an agent for creditors /suppliers and not for the appellant. The CIT (A) held that the AO examined both the payments of Rs. 58,29,830 made during year and Rs. 2,68,66,115 paid during year out of opening balance as on 01.04.2007 under Rule 6DD(k) and consequently, made

disallowance of Rs. 58,29,830 during year and 20% of Rs. 2,68,66,115 during A.Y. 2007-08 assessment order direction of Tribunal by passing order under section 154 of the Act. Further, the assessee has accepted order under section 154 and only challenged the calculation mistake of disallowance against the order under section 154 in appeal before CIT (A), which has been allowed by CIT (A). In view of this matter, the findings of the AO were upheld.

**14.** Being, aggrieved the assessee filed this appeal before the Tribunal. The learned Counsel by placing reliance on the judgement of Hon`ble Punjab & Haryana High Court in the case of CIT v. Smt. Shelly Passi [2013] 350 ITR 227 (P&H) submitted that where the assessee has purchased goods and deposited cash directly in bank account of seller, no disallowance could be made in hands of payee -assessee. In the instant case, the payments by way of cross cheque were deposited in bank account of seller/creditors hence, Rule 6DD (k) has no application. The learned

counsel for the assessee further relied on the decision of Co-ordinate Bench of Kolkata tribunal in the case of Rampada Panda v. ITO [2016] 65 taxmann.com 213 (Kol-Trib) where the assessee has directly deposited the payments in the bank account of supplier PF which has acknowledged by concerned supplier by crediting it into ledger account of the assessee and genuineness of these payments had also not been doubted by revenue, provision of section 40A (3) could not be made applicable. In the case of the assessee also, payments are not doubted and held that payments were directly made by cross cheque to supplier/creditors. Hence, this case is squarely applicable to present facts of the case. Further, the AO did not examine Shri Manoj Sharma by issuing summons under section 131 of the Act, even though specifically requested by the assessee.

**15.** We have heard the rival submissions and perused the relevant material on record. We find that the appeal for A.Y. 2007-08 has been set-aside by us to the file of the AO as the AO has not granted due opportunity of being heard as required under

section 154(3) of the Act in respect of disallowance pertaining to an amount of Rs. 2,68,66,115/-. This disallowance were examined by the AO while making assessment for A.Y. 2008-09. It is the case of the assessee that the payments of Rs. 58,29,830 were examined with reference to payments made through an agent, however, the assessee could not produce the said agent. Now the assessee has claimed that payments were made directly to creditors by the assessee through cross cheques given to agent. Therefore, placing reliance on the judgement of Hon`ble Punjab & Haryana High Court in the case of CIT v. Smt. Shelly Passi [2013] 350 ITR 227 (P&H) it has been held that where the assessee has purchased goods and deposited cash directly in bank account of seller, no disallowance could be made in hands of payee -assessee. In the instant case, the payments by way of cross cheque were deposited in bank account of seller/ creditors hence, Rule 6DD (k) has no application. The learned counsel for the assessee further relied on the decision of Kolkata tribunal in the case of Rampada Panda v. ITO [2016] 65 taxmann.com 213 (Kol-Trib) where the assessee has directly deposited the payments in the bank account of supplier PF which is acknowledged by concerned supplier by crediting it into ledger

account of the assessee and genuineness of these payments had also not been doubted by revenue, provision of section 40A (3) could not be made applicable. In the case of the assessee, payments are not doubted and held that payments were directly made by cross cheque to supplier/creditors. Hence, this case is squarely applicable to present facts of the case. However, this aspect has not been examined by the AO. Nor the AO has examined Shri Manoj Kumar Sharma by issuing summons under section 131 of the Act as requested by the assessee. Therefore, as we have set-aside the assessment for the assessment year 2007-08. Therefore, it would be in the fitness of things and in the interest of justice that one more opportunity of being heard is allowed to the assessee on entire disallowances i.e. disallowance for both assessment year involved [i.e. A.Y.2007-08 and A.Y. 2008-09]. In the light of above facts and circumstances, and law position, we are of the considered opinion that the entire issue needs to be re-evaluated or re-visited by the AO on the line of the ratio as laid down in the case of CIT v. Smt. Shelly Passi [2013] 350 ITR 227 (P&H) and Rampada Panda v. ITO [2016] 65 taxmann.com 213 (Kol-Trib) where the assessee has directly deposited the payments in the bank account of supplier PF which

is acknowledged by concerned supplier by crediting it into ledger account of the assessee and genuineness of these payments had also not been doubted by revenue, provision of section 40A (3) could not be made applicable. The AO will also examine Shri Manoj Kumar Sharma after issuing summons under section 131 of the Act or on production by the assessee. Accordingly, we set-aside this issue to file of the AO for making de-nova assessment on this point to the file of the Assessing Officer for allowing proper opportunity of being heard in accordance with law. Nevertheless, to mention that the assessee will cooperate in the assessment proceedings and file necessary evidences on which he wants to rely upon.

**16.** In the result, the appeal of the assessee for the assessment year 2007-08 and A.Y. 2008-09 are allowed for statistical purposes.

**17.** The order pronounced in the open Court on 15-05-2018.

Sd/-

(सी.एम.गर्ग) / (C.M. GARG)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ ACCOUNTANT MEMBER

सुरत/ Surat: दिनांक /Dated : 15<sup>th</sup> May, 2018/opm

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

Sd/-

(ओ.पी.मीना) / (O.P.MEENA)

By order

/ / TRUE COPY / /

Assistant Registrar, Surat