

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA Nos.5074 & 5075/Del/2018  
Assessment Years: 2012-13 & 2013-14

Goel Jewellers Overseas Corp., Vs. JCIT,  
2213, Gurudwara Road, Special Range-17,  
Karol Bagh, New Delhi.  
New Delhi.

PAN: AAGFG6440E

(Appellant)

(Respondent)

Assessee by : Shri J.C. Kochar, CA  
Revenue by : Shri Amit Jain, Sr.DR

Date of Hearing : 12.03.2019  
Date of Pronouncement : 14.03.2019

ORDER

The above two appeals by the assessee are directed against the separate orders dated 24<sup>th</sup> May, 2018 of the CIT(A)-17, New Delhi, relating to Assessment Years 2012-13 and 2013-14, respectively.

2. Since common grounds are raised by the assessee in both the appeals, therefore, these were heard together and are being disposed of by this common order.

3. First we take up ITA No.5074/Del/2018 for assessment year 2012-13. Facts of the case, in brief, are that the assessee is a partnership firm engaged in the business of exporting and trading of gold, diamonds and silver ornaments and jewellery. It filed

its return of income on 21<sup>st</sup> September, 2012 declaring an income of Rs.37,03,589/-. The Assessing Officer, in the assessment order passed u/s 143(3) on 9<sup>th</sup> March, 2015, made certain additions one of which was an amount of Rs.6 lakhs which was made under the provisions of section 40A(3) of the Act on account of cash payments made against the salary to the partners. The assessee filed an appeal before the CIT(A) who decided the same against the assessee. On further appeal by the assessee, the Tribunal, vide order dated 2<sup>nd</sup> November, 2016, vide ITA No.3029/Del/2016, restored the issue to the file of the Assessing Officer with the following observations:-

*“6. I have considered the submission of both the parties and perused the material available on the record in the present case it is not clear as to whether the amount considered by the AO in violation of the provisions of Section 40(A)(3) of the Act on account of partner’s salary were the withdrawals by the partners or not. In my opinion, this issue requires fresh adjudication at the level of the AO. Therefore, the impugned order is set aside on this issue and the matter is restored to the file of the AO to be adjudicated a fresh in accordance with law after providing a due and reasonable opportunity of being heard to the assessee”*

4. Subsequently, the Assessing Officer in the set aside proceedings, again, repeated the addition. While doing so, he held that the payment of Rs.25,000/- per month made to each of the two partners (totaling to Rs.6 lakhs) was on account of salary expenditure and such payments were withdrawals out of capital introduced by the partners. Therefore, the provisions of section 40A(3) are still applicable if such payments have been made out of the opening balance which comprised salary credited in the preceding years.

5. In appeal, the ld.CIT(A) upheld the action of the Assessing Officer.

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal raising the following grounds of appeal:-

“1. That on the facts and in the circumstances of the case, the Id. CIT (Appeals) erred in holding that the cash withdrawals of two Partners @ Rs.25,000 per month, aggregating Rs. 6,00,000, from their Current Capital accounts represented salary paid to the Partners and was rightly disallowed by the AO u/s 40A(3) of the Income Tax Act, 1961.

2. That the Id. CIT(A) erred in not considering that at any rate, since there was no doubt about the identity of the payee and genuineness of the expenditure, no disallowance u/s 40A(3) could be made and in this regard the ratio of the judgment of the Hon’ble Supreme Court in the case of ATTAR SINGH GURMUKH SINGH VS. INCOME TAX OFFICER, LUDHIANA ETC. (1991) 191 ITR 667 and many High Courts and different benches of the Tribunal were ignored.

3. That the Id. CIT(A) erred in not appreciating that the purpose of Section 40A(3) is to prevent tax evasion and in this case, there could be no tax evasion as the Salary to partners claimed as deduction by the firm had already suffered tax in the hands of the partners.

4. The Id. CIT(A) erred in not appreciating that a partnership firm is not a separate legal entity and every partner is an agent of the firm (Section 18 of the Partnership Act, 1932) and hence any payment made by the firm to a partner is a payment to itself and therefore not amenable to the provisions of Section 40A(3).

5. That the impugned order suffers from the vice of non-application of as the Id. CIT(A) has recorded a finding that “*the salary is credited every month to the current account of the partner and there are cash withdrawals on the same date or immediate next date when the salary is credited*”, which is contrary to facts and the findings of the Assessing Officer, who has incorporated the ledger accounts of the Current Accounts of the partners in the assessment order.

7. The Id. counsel for the assessee, at the outset, submitted that the provisions of section 40A(3) applies only to expenditure where payment has been made otherwise than by an account payee cheque or draft. However, salary paid by a firm to its partner is not an expenditure, but, appropriation of profit. Relying on various decisions, he submitted that salary paid to partners in cash exceeding Rs.20,000/- will

not attract the provisions of section 40A(3) of the IT Act. He accordingly submitted that the order of the CIT(A) be set aside and the grounds raised by the assessee be allowed.

8. The Id. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that the assessee, in the instant case, is maintaining a fixed capital account and current account of the partners in the books of the partnership firm. In the copy of the current account all the partners' salary is credited every month and there are cash withdrawals on the same date or immediate next date when the salary is credited. Therefore, the act of passing an entry in the current account will not change the character of the payment made since in this case salary has been credited to the partner's account and cash has been withdrawn on immediate basis. Therefore, in absence of any evidence submitted by the assessee to show that the cash payments were in lieu of cash drawings the order of the CIT(A) being in accordance with law should be upheld.

9. I have considered the rival arguments made by both the sides and perused the material available on record. I find the Tribunal, in the first round of litigation, has restored the issue to the file of the Assessing Officer with certain directions. It is an admitted fact that the salary of the partners are credited to the current account of the partners in the books of account maintained by the partnership firm. Although the partners have withdrawn cash from the partnership firm in excess of Rs.20,000/- at a time, however, the same, in my considered opinion, will not attract the mischief of the

provisions of section 40A(3) of the Act since it is drawing by the partners, after salary is credited to the current account. The provisions of section 40A(3), in my opinion, will not be applicable to cash drawings by the partners from their respective current account. I, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition made by the Assessing Officer. The grounds raised by the assessee are accordingly allowed.

ITA No.5075/Del/2018 (A.Y.: 2013-14)

10. After hearing the rival submissions made by both the sides, I find the grounds raised by the assessee in the impugned appeal are identical to the grounds raised by the assessee in ITA No.5074/Del/2018. I have already decided the issue and the ground raised by the assessee is allowed. Following the same reasonings, the grounds raised by the assessee in the instant case are also allowed.

11. In the result, both the appeals filed by the assessee are allowed.

The decision was pronounced in the open court on 14.03.2019.

Sd/-  
(R.K. PANDA)  
ACCOUNTANT MEMFBER

Dated: 14<sup>th</sup> March, 2019

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi