

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.658 & 659/Ind/2017
Assessment Years: 2012-13 & 2013-14

M/s Kalyan Lok Nirman Pvt. Ltd & M/s Kalyan Grah Nirman Pvt. Ltd, Indore (Appellant)	Vs.	DCIT (Central), Indore (Respondent)
PAN No.AADCK8295K/AAECK4044M		

Revenue by	Smt. Ashima Gupta, CIT
Assessee by	Shri Ajay Tulsian & Ms. Shalini Mehta, CA's
Date of Hearing	03.07.2019
Date of Pronouncement	09.07.2019

ORDER

PER MANISH BORAD, AM.

The above captioned two appeals are filed at the instance of the assessee. Appeals No. 658 & 659/Ind/2017 for Assessment Years 2012-13 & 2013-14 are directed

against the order of Ld. CIT(Appeals)-III (in short 'CIT(A)'), Indore dated 27.07.2017 which are arising out of the order u/s 143(3) of the Income Tax Act 1961 (In short the 'Act') dated 30.12.2013 and 22.02.2016 framed by DCIT (Central) & DCIT (Central)-2, Indore respectively.

2. As the issues raised in these appeals are mostly common, these were heard together and are being disposed off by this common order for the sake of convenience and brevity.

3. The sole common issue raised in both these appeals relates to disallowance u/s 40A(3) of the Act for the alleged payment in cash in excess of the limit prescribed u/s 40A(3) of the Act for making payment for purchase of land. Disallowance of Rs.4,26,060/- has been made for Assessment Year 2012-13 and disallowance of 18,50,000/- has been made for Assessment Year 2013-14 u/s 40A(3) of the Act. As agreed by both the parties that the facts and

issue remains the same for both the years, we will therefore adjudicate the issue based on the facts and figures for Assessment Year 2012-13. Grounds of appeal raised by the assessee for Assessment Year 2012-13 which reads as follows;

1. *That the Ld. CIT(A) erred in confirming the addition of Rs.4,26,060/- made by the AO in respect of cash payment made for purchase of land u/s 40A(3). That on the facts and in the circumstances of the case, the said addition is bad in law, uncalled for and deserves to be deleted.*
2. *That the appellant craves leave to add, to alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of appeal on or before final hearing, if necessity so arises.*

4. Brief facts of the case are that the assessee is a company belonging to Kalyan Group of Indore engaged in the business of construction, real estate and infrastructure development. The original return of income u/s 139(1) was filed electronically declaring income of Rs. Nil. Search operations were conducted on the business as well as residential premises of the Kalyan Group of Indore from

05.05.2011 to 07.05.2011. Assessment proceeding were initiated under Section 153A in this case wherein notices u/s 143(2) and 142(1) were issued on 06.09.2013 and 01.11.2013 respectively. During the course of assessment proceedings the Ld. A.O observed that the assessee had purchased lands during the year as part of its stock in trade, and since they were not sold during the year they were carried forward as closing stock. On examining the transaction it was revealed that a cash sum of Rs.4,26,060/- was made for the purchase of land in violation of the limits prescribed u/s 40A(3) of the Act which for the relevant assessment year was Rs.20,000/-. Genuineness of the transaction of purchase of land was not in dispute. Ld. A.O accordingly made disallowance u/s 40A(3) of the Act at Rs.4,26,060/- and assessed the income u/s 153A r.w.s. 143(3) of the Act at Rs.4,26,060/- . The assessee preferred appeal before Ld. CIT(A) but could not

succeed.

5. Now the assessee is in appeal before the Tribunal.

6. Ld. Counsel for the assessee submitted that the appellant company acquired certain lands during the year under consideration. Out of the total purchases made during the year a piece of land situated at Gram -Bada Bangda Tehsil -Indore (New Tehsil -Hatoad) Zila -Indore M.P. was purchased and got registered on 31.03.2012 for a total consideration of Rs.17,04,240/- out of which only a nominal amount of Rs. 4,26,060/- was paid in cash whereas the balance amount was paid through banking channel. Complete details and copies of registered sale deeds evidencing the purchase, substantiating the identity of the payees and establishing the genuineness of the transactions were filed before the Learned AO and as well as before the Learned CIT(A), copies of which are

enclosed at Page No.17 to 26 of PB. During the assessment proceedings as well as during the proceedings before the Learned CIT(A) it was explained that the sole transaction of cash payment was genuine and the identity of the payee was very well establish and the payment was made purely out of business exigencies and as per the traditions prevailing at that point of time with regard to such transactions. As per the then prevalent tradition in real estate transactions sometimes cash payments were required to be made on the insistence of the seller, being farmers and also due to the fact that the sellers were always new and no transaction generally happens with same party again. The said transaction, stands properly recorded in books of accounts as well as supported by registered sale deeds. The genuineness of the transaction is duly documented in

the sale instrument which was duly registered with the Sub- Registrar of properties being a State Government Authority. It is to be noticed that neither the Learned AO nor Hon'ble CIT(A) controverted the genuineness of the transaction as well identity of the selling party. The disallowance was made in assessment order in mechanical manner by stating that the provision of 40A(3) were violated as cash payments were made to acquire trade assets and that it was not the case that farmers (sellers) did not had bank accounts. The relevant discussion is on page no 3 of the assessment order. The same view was endorsed by the Hon'ble CIT(A) while sustaining the addition u/ s 40A(3), wherein the discussion is on page 3 & 4 of the first appellate order.

7. Ld. Counsel for the assessee apart from referring to various judgments mentioned below also placed reliance on the recent decision of the Co-ordinate Bench, Indore in the case of DCIT V/s M/s Brilliant Sare Reality Pvt. Ltd IT(SS)A No.44/Ind/2015 dated 28.12.2018 wherein similar issue was adjudicated and decided in favour of the assessee.

- 1.Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh v ITO (1997) 191 ITR 0667.
- 2.Hon'ble Rajasthan High Court in case of Smt. Harshila Chordia vs. ITO (2007) 208 CTR (Raj.)
- 3.Hon'ble Co-ordinate Bench of ITAT, Jaipur ITA No.625/JP)/14 in case of M/s. Ajmer Food Products Pvt. Ltd, Ajmer vs. JCIT Range-2, Ajmer.
- 4.Hon'ble Punjab & Haryana High Court in case

- of Gurdas Garg Vs. CIT(A) Bathinda (2015) 63
taxmann.com 289.
- 5.Hon'ble Amritsar ITAT in case of Rakesh Kumar
vs. ACIT ITA No.102(Asr)/2014.
- 6.Hon'ble Co-ordinate Bench, Chandigarh ITA No.
115/chd/2013 & others in case of M/s. Dhuri
Wine Vs. DCIT.
- 7.Hon'ble Rajasthan High Court in case of M/s
ACE India Abodes Limited (DB Appeal
No.45/2012 dated 11.09.2017).
- 8.Hon'ble ITAT Jaipur Bench in case of M/s. A.K.
Daga Royal Arts Vs. ITO ITA No.1065/Jp/2016
dated 15.05.2018.
- 9.Hon'ble Chandigarh ITAT Division Bench 'A' in
the case of Shri Jai Tej Singh vs ITO Ward 6(2)
Mohali ITA No.750/Chd/2017 dated
17.07.2018.

8. Per contra Ld. Departmental Representative vehemently argued and supported the orders of lower authorities.

9. We have heard rival contentions and perused the records placed before us and carefully gone through the judgment referred by Ld. Counsel for the assessee.

10. Sole grievance of the assessee is against the finding of Ld. CIT(A) confirming the disallowance u/s 40A(3) of the Act at Rs.4,26,060/- for the alleged payment of cash in violation of the limits prescribed u/s 40A(3) of the Act. We observe that the assessee is into the real estate business and regularly make purchases and sale of land. During the year under appeal lands were purchased. In one of the transaction cash payment of Rs.4,26,060/- was made part of the total purchase consideration of Rs.17,04,240/- and the balance was paid by account payee cheque.

Genuineness of the transaction is not doubted at the end of

both the parties. Assessee has also not claimed the purchase as expenditure during the year and has carried forward the cost of purchase i.e. land as closing stock shown under the head inventories in the balance sheet.

11. We observe that similar issue came up for adjudication before us in the case of DCIT V/s M/s. Brilliant Sare Reality Pvt. Ltd (supra) wherein the disallowance u/s 40A(3) of the Act was deleted observing as follows;

12. It is the case of the assessee that the payment in cash exceeding the monetary limit so prescribed was due to the business expediency as the sellers of the land insisted for making payments in cash. However, substantial payments were made through banking channel. It is contended that the assessee had no intention of evading tax. All transactions are genuine business transactions. The reliance is placed on various judicial pronouncements to buttress the contention that the provisions to be liberally construed. For the sake of

clarity, the relevant provisions of section 40A(3) of the Act and Rule 6DD are reproduced as under:-

Section 40A(3):

“Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [or use of electronic clearing system through a bank account, exceeds ten thousand rupees,] no deduction shall be allowed in respect of such expenditure.”

Rule 6DD:

No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3A) of section 40A where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees in the cases and circumstances specified hereunder, namely:-*

- (a) *Where the payment is made to—*
- i. The Reserve Bank of India or any banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);*
 - ii. The State Bank of India or any subsidiary bank as defined in section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);*

- iii. *Any co-operative bank or land mortgage bank;*
 - iv. *Any primary agricultural credit society or any primary credit society as defined under section 56 of the Banking Regulation Act, 1949 (10 of 1949);*
 - v. *The Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956);*
- (b) *Where the payment is made to the Government and, under the rules framed by it, such payment is required to be made in legal tender;*
- (c) *Where the payment is made by—*
- i. *Any letter of credit arrangements through a bank;*
 - ii. *A mail or telegraphic transfer through a bank;*
 - iii. *A book adjustment from any account in a bank to any other account in that or any other bank;*
 - iv. *A bill of exchange made payable only to a bank;*
 - v. *The use of electronic clearing system through a bank account;*
 - vi. *A credit card;*
 - vii. *A debit card.*

Explanation—For the purposes of this clause and clause (g), the term “bank” means any bank, banking company or society referred to in sub-clauses (i) to (iv) of clause (a) and includes any bank [not being a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949), whether incorporated or not, which is established outside India;

- (d) *Where the payment is made by way of adjustment against the amount of any liability incurred by the payee for any goods supplied or services rendered by the assessee to such payee;*
- (e) *Where the payment is made for the purchase of—*
- (i) *Agricultural or forest produce; or*
 - (ii) *The produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming; or*
 - (iii) *Fish or fish products; or*
 - (iv) *The products of horticulture or apiculture, to the cultivator, grower or producer of such articles, produce or products;*
- (f) *Where the payment is made for the purchase of the products manufactured or processed without the aid of power in a cottage industry, to the producer of such products;*
- (g) *Where the payment is made in a village or town, which on the date of such payment is not served by any bank, to any person who ordinarily*

- resides, or is carrying on any business, profession or vocation, in any such village or town;*
- (h) Where any payment is made to an employee of the assessee or the heir of any such employee, on or in connection with the retirement, retrenchment, resignation, discharge or death of such employee, on account of gratuity, retrenchment compensation or similar terminal benefit and the aggregate of such sums payable to the employee or his heir does not exceed fifty thousand rupees;*
 - (i) Where the payment is made by an assessee by way of salary to his employee after deducting the income-tax from salary in accordance with the provisions of section 192 of the At, and when such employee—*
 - i. Is temporarily posted for a continuous period of fifteen days or more in a place other than his normal place of duty or on a ship; and*
 - ii. Does not maintain any account in any bank at such place or ship;*
 - (j) Where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike;*
 - (k) Where the payment 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;*
 - (l) Where the payment is made by an authorised dealer or a money changer against purchase of foreign currency or travellers cheques in the normal course of his business.*

Explanation—For the purposes of this clause, the expressions “authorised dealer” or “money changer” means a person authorised as an authorised dealer or a money changer to deal in foreign currency or foreign exchange under any law for the time being in force.]”

13. The Ld. CIT(A) had relied upon the decision of coordinate bench rendered in the case of CIT Vs. Magnificent Construction Private Limited in IT(SS)A No.83 to 85/Ind/2011 dated 7.6.2012 in which the Tribunal has held as under:

15. In terms of our discussion hereinabove in case of Magnificent Construction Private Limited, the addition was made by the Assessing Officer in case of Zoom Reality in the assessment year 2006-07 to 2008-09 in respect of cash payment made for purchase of agricultural land. By the impugned order, the Id. CIT(A) confirmed the addition after having following observations : “The CIT(A) has confirmed the disallowance by observing that where the land so purchased was as stock in trade and merely because the assessee has not accounted for such expenditure in the profit and loss account and corresponding closing balance, work in progress, has not been credited the profit and loss account, due to wrong presentation in the profit and loss account, the assessee cannot come out of the purview of Section 40A(3).”

16. We have considered the rival contentions and find from record payment so made was not claimed as expenditure

in the profit and loss account and, therefore, provisions of Section 40A(3) is not attracted. The assessee has also given undertaking to offer the disallowance u/s 40A(3), while claiming such business expenditure in the future. In view of these undertaking of the assessee and keeping in view, the provisions of Section 40A(3) as discussed hereinabove, we do not find any justification for the disallowance made during the year under consideration. Accordingly, we modify the order of both lower authorities and direct the Department to make disallowance by attracting provisions of Section 40A(3) only in the years in which assessee claims such payment as expenditure for arriving at its business profits. We direct accordingly.

14. From the above decision, it is clear that in that case, the assessee had not claimed expenditure in its profit & loss account. The reliance is also placed by the Ld. CIT(A) on the decision of Hon'ble Delhi High Court rendered in the case of CIT Vs. Rhydberg Pharmaceuticals Ltd. 269 ITR 561. The Hon'ble High Court held as under:

“We may note that we are not of the view that obtaining a cheque or a bank draft is hazardous and cumbersome procedure. Suffice it to say that in the present case, the Tribunal was of the opinion that the payee insisted for cash payment as observed by the learned CIT(A) and further that the transactions were found to be genuine. We may also note that in Attar Singh Gurmukh Singh Vs. ITO (1991) 97 CTR (SC) 251 : (1991) 191 ITR 667 (SC), it is pointed out that terms of s. 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 up to the assessee to furnish to the satisfaction of the A.O. the circumstances under which payment, in the manner prescribed in s. 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 cash payment.”

15. Ld. Counsel for the assessee has also relied upon judgment of Hon'ble Allahabad High Court in the case of CIT Vs. Choudhary & Company (supra). It is stated by the Ld. Counsel for the assessee that the cash payment was made on insistence of the seller of the land. It is further stated that the

amount is duly recorded in the sale deeds and there is no doubt raised about genuineness of the transaction by the authorities below. He therefore, submitted that in the light of the various case laws, addition by invoking provisions of section 40A(3) of the Act was not justified. Looking to the totality of the facts and in view of the fact that the assessee had to make payment on the insistence of the sellers respectively and following the judgement of Hon'ble Rajasthan High Court in the case of Smt. Harishila Chordia Vs. ITO in 298 ITR 92 and more particularly in the case of Anupam Teleservices Vs. ITO in tax appeal No.556 of 2013 of Hon'ble Gujarat High Court, we do not see any reason to interfere in the finding of the Ld. CIT(A) and the same is hereby affirmed. Ground raised by the revenue is dismissed”.

11A.Examining the facts of the instant appeal in the light of the above decision of the Co-ordinate Bench, we find that the facts remains the same and so as the issue. In the instant appeal also the assessee purchased the land at Gram Bada Baghda, Tehsil, Indore for total consideration

of Rs.17,04,240/- and except for the amount of Rs.4,26,060/- paid in cash, the balance amount was paid through account payee cheque. The details of payment through cheque and cash were provided in the sale deed placed before the registering authority along with the identity of the payers and sellers and the same was duly registered. Genuineness of the transaction as well as the concerned parties is not under dispute. But since the land purchased by the assessee forms part of stock and trade the provisions of Section 40A(3) of the Act comes into operation. During the course of hearing when the question was asked to the Ld. Counsel for the assessee that what would be situation if the assessee will claim the cost of land as expenditure in subsequent years then will it not violate the provisions of Section 40A(3) of the Act in the year of claim. In reply Ld. Counsel for the assessee in his capacity as Officer of the court stated that the assessee will

give an undertaking to the effect that the impugned amount will not be claimed as expenditure in subsequent years against the revenue/gross turn over. Ld. Departmental Representative also did not oppose to the statement given by Ld. Counsel for the assessee.

12. We therefore in the given facts and circumstances of the case and respectfully following the decision of the Co-ordinate Bench and other judgments referred and relied by Ld. Counsel for the assessee and also in view of the undertaking which shall be given by the assessee before the Ld. Assessing Officer of not claiming the alleged amount as expenditure in subsequent years, set aside the finding of Ld. CIT(A) and allow the sole ground raised by the assessee and delete the disallowance made u/s 40A(3) of the Act at Rs.4,26,060/-. Appeal of the assessee for Assessment Year 2012-13 vide Appeal No.658/Ind/2017 stands allowed.

13. Apropos Appeal No.659/Ind/2017 for Assessment Year 2013-14 of the assessee, the facts and issue remains the same except for the amount of disallowance u/s 40A(3) of the Act at Rs.18,50,000/- Since we have already adjudicated the issue in the preceding paras our decision shall apply *mutandis mutandis* on the grounds raised for the Assessment Year 2013-14. We accordingly set aside the finding of Ld. CIT(A) and allow the sole ground raised by the assessee and delete the disallowance made u/s 40A(3) of the Act at Rs.18,50,000/-. In the result assessee's Appeal No.659/Ind/2017 is allowed.

14. In the result both the appeals of the assessee for Assessment Year 2012-13 and 2013-14 vide ITA No.658 &659/Ind/2017 are allowed.

The order pronounced in the open Court on
09.07.2019.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 09 July, 2019
/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By order
Asstt.Registrar, I.T.A.T., Indore