

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "C" : DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA.No. 1888/Del/2017  
Assessment Year 2013-2014

GAYATRI BUILD ASSOCIATES PVT. LTD., C/O KAPIL GOEL, ADV. F-26/124, SECTOR-7, ROHINI, DELHI (PAN: AADCG8351N)	VS.	DCIT, CIRCLE-1, MEERUT
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate
For Revenue :	Shri Amit Katoch, Sr. DR.

**ORDER**

**PER H.S. SIDHU, JM**

This appeal by assessee has been directed against the Order of the Ld. CIT(A), Meerut, Dated 08.3.2017, for the A.Y. 2013-2014, on the following grounds :

1. *"That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in sustaining the addition of Rs.*

*3,70,11,381/- made by AO on account of disallowance of expenditure u/s. 40A(3) of the Income Tax Act, 1961.*

*2. That the appellant craves leave to add/alter any / all grounds of appeal before or at the time of hearing of the appeal.*

2. The brief facts of the case are that the assessee filed its return of income on 26-09-2013 declaring total income of Rs.40,75,330/-. The assessee's case was selected for scrutiny through CASS and statutory notice u/s 143(2) of the Income Tax Act, 1961 (in short "Act") dated 04-09-2014, fixing the date of hearing for 12-09-2014 was issued which was served upon the assessee. Thereafter, notice under section 142(1) of the Act was issued to the assessee on 01-12-2014, 21-05-2015, 29-05-2015, 28-08-2015 and 08-12-2015. In response to these notices, AR of the assessee attended the proceedings and filed written reply explaining details, acknowledgment of ITR, audited accounts, tax audit report, details of bank accounts. Detailed questionnaire with notices under section 142(1) of the Act were issued on 23-02-2016, 04-03-2016 and 15-03-2016. The assessee carried the business of builder in the status of Private Limited company. The books of accounts were not produced which were called for and the assessee

field letter dated 02-03-2016, the contents of the same are mentioned at page no. 2 of the assessment order. After considering the same, the AO observed that Assessee has failed to submit any evidence that there was bank holiday on 19.9.2012. AO also observed that assessee is changing its stand at every step and claiming exemption for cash payment of sum exceeding Rs. 20,000/- either at one count or other count. There was no exceptional circumstances for the assessee to make cash payment because it could issue the cheque at the time of registration of document because it has purchased the property worth Rs. 13 crores and above and negotiations might be going from past many days also assessee made only part payment of Rs. 3,70,11,381/- in cash and not the full payment in cash. So it is found that there was no such necessity to make such payment in cash which is revenue expenses for the assessee. If it was a capital expenses, then there is no question for cash payment. So in absence of any evidence put forward by the assessee, this contention was rejected and the expenditure of Rs. 3,70,11,381/- incurred in purchase of land was disallowed under section 40A(3) of the Income Tax Act, 1961 and added to the income of the assessee vide order dated 22.03.2016. Against the assessment order dated 22.3.2016, assessee appealed before the Ld. CIT(A), who vide his impugned order dated

08.3.2017 has affirmed the action of the AO and partly allowed the appeal of the assessee. Against the impugned order of the Ld. CIT(A), assessee is in appeal before the Tribunal.

3. Ld. Counsel for the assessee submitted that consistently before the lower authorities assessee has been harping upon the factum of genuineness of payment where payee to whom payment is made by assessee in prohibited made u/s. 40A(3), is also assessed with ACIT, Circle-2, Meerut where assessee is also assessed at Meerut itself, where there is no doubt on payment being received by identified seller which stands thoroughly uncontroverted. It was further submitted that the sale deed are registered which evidences and confirms beyond pale of doubt the genuineness of payment aspect. He further submitted that these contentions were addressed to AO at first stage itself which has not been adverted by lower authorities. It was further submitted that once genuineness of payment is not in dispute and payee is identifiable from payment is duly confirmed, rigors of section 40A(3) stands discharged. He further stated that exactly similar issue has already been adjudicated and decided in favour of the assessee by the various decisions of the ITAT and the Hon'ble High Courts. In support of his contention, he filed the copy of the of ITAT, Delhi Bench in the case of ACIT, Central Circle-2, Faridabad vs. M/s. Marigold

Merchandise (P) Ltd., New Delhi, in ITA.No.5170/Del./2014 for the A.Y. 2006-2007 wherein the in Revenue's appeal similar addition was deleted. He further stated that the above decision of the ITAT, Delhi delivered in the case of ACIT vs. Marigold Mercahndise (P) Ltd. (Supra) on identical facts and circumstances of the case has also been followed by the ITAT, 'D' Bench in the case of M/s KGL Network (P) Ltd. Vs. ACIT which was decided on 02.7.2018 in ITA No. 301/Del/2018 (AY 2014-15) wherein, the appeal of the assessee was allowed on the similar issue and addition in dispute was deleted.

4. On the contrary, Ld. DR draw our attention towards the amendment of Rule 6DD(j) and stated that the amended section now provides that 20 percent of cash expenditure made in violation of section 40A(3) will be disallowed in computing the total income of an assessee irrespective of cash payments made under exceptional or unavoidable circumstances or in case of genuine difficulty to the payee or such other circumstances where cash payment is inevitable.

5. We have considered the rival submissions as well as considered the decision relied upon by the Ld. Counsel for the assessee. We find considerable cogency in the contention of the Ld. Counsel of the assessee that before the lower authorities the assessee has submitted

that the factum of genuineness of payment where payee to whom payment made by assessee in prohibited made u/s. 40A(3), is also assessed with ACIT, Circle-2, Meerut where assessee is also assessed at Meerut itself, where there is no doubt on payment being received by identified seller which stands thoroughly uncontroverted. It is further noted that the sale deed are registered which evidences and confirms beyond pale of doubt the genuineness of payment aspect. We further note that once the genuineness of payment is not in dispute and payee is identifiable from where payment is duly confirmed, rigors of section 40A(3) stands discharged. The authorities below have not doubted the identity of the payee and the genuineness of the transaction in the matter. Therefore, the decision of ITAT, Delhi Bench in the case of ACIT, Central Circle-2, Faridabad vs. M/s. Marigold Merchandise (P) Ltd., (supra), is squarely applicable to the facts of the case, wherein the Tribunal vide its Order dated 11.09.2017 has dismissed the Departmental Appeal. The relevant portion of the order of the Delhi Tribunal in paras-6 to 8 is reproduced as under :

"6. *We have heard both the parties and perused the records available on record especially the impugned order. With regard to disallowance u/s. 40A(3) of the Income Tax Act is concerned, we find that assessee has purchased the land at Village NangliUmarpur Distt. Gurgaon for a sum of Rs. 3.69 Cr. from the seller parties namely Sh. Pohap Singh,*

*Sh. Chet Singh, Sh. Chandra, Sh. Kishan, Smt. Vidhya, Smt. Jagwati, Smt. Veerwati and Smt. Lali. The purchase of agriculture land is evidenced through sale deed and the payment is also evidenced by way of the sale deed executed before the Sub Registrar. There is no dispute on the fact that the identity of the payee is proved, the genuineness of the transaction is proved and the source payment is also established in as much as such amount is found to be withdrawn from the HDFC bank account of the appellant company. The AO's case is that the provisions of sec. 40A(3) are of mandatory nature whereas the assessee- relying on the decision of the Hon'ble Jurisdictional Rajasthan High Court in the case of Harshee a Chordia vs. CIT supra has contended that when identity of the payee, genuineness of the transaction and source of payment is established then provision of section 40A(3) cannot be applied. The Hon'ble Rajasthan High Court while interpreting the provisions of Sec. 40A(3) in the case of Harshila Chordia vs, ITO supra has clearly held that when the genuineness of the transaction/payment is not disputed and the identity of the payee / received is established then such case will fall under the exceptional circumstances covered under-rule 6DD of IT Rules. The decision of the Hon'ble Jurisdictional ITAT in the case of the M/s Ace India Abodes Ltd. vs. ACIT CC-2, Jaipur in ITA no. 79/JP/2011 order dated 12.2.2011 and in the case of the M/s Shree Salaaar Overseas Pvt. Ltd.: vs. DCIT, Circ1e-2 in ITA no. 56/JP/2 10, order dated 21.2.2011 also supported the assessee's contention. The decision of the Jurisdictional High Court and the Jurisdictional ITAT are also of binding nature. Therefore respectfully following the ratios of judgment of the Jurisdictional High Court as well as ITAT decisions, Ld. CIT(A) has rightly held that the assessee's case is found to be covered under the exceptional circumstances under rule 6DD of IT Rules. Accordingly, the addition made by the AO amounting to Rs. 60 lacs was rightly deleted by the*

*Ld. CIT(A). Also we find no force in the arguments advanced by the Ld. DR, in view of the decision of the ITAT, 'B' Bench, Kolkata vide Order dated 18.11.2015 passed in ITA No. 1448/Kol/2011 AY 2008-09 in the case of Sri ManoranjanRaha vs. ITO wherein the Tribunal has held as under:-*

*4.3 We have heard the rival submissions and perused the materials available on record. We find that the payments made by cash in violation of Section 40A(3) of the Act have been duly acknowledged by the recipient Sh. Amit Dutta who had deposed before the Ld. AO and confirmed the fact of receipt of monies in cash. Hence the genuinity of payments made by the assessee stands clearly established beyond doubt. Even for the amounts enhanced by Ld. CIT(A) in the sum of Rs. 54,01,473/-, the genuineness of the payments and the necessity to incur the said expenditure for the purpose of business of the assessee was never disputed by the Ld. CIT(A). We hold that since the genuinity of the payments made to the parties is not doubted by the revenue, the provisions of section 40A(3) could not be made applicable to the facts of the instant case. It will be pertinent to go into the intention behind introduction of provisions of section 40A(3) of the Act at this juncture. We find that the said provision was inserted by Finance Act 1968 with the object of curbing 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."*

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

Attar Singh Gurmukh Singh vs. ITO reported in (1991) 191 ITR 667 (SC)

*"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 practicable or 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.1 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 beater 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 Tete Services vs ITO in (2014) 43 Taxmann.com 199 (Guj)*

*"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 assessee]"*

*Sri Laxmi Satvanaravana Oil Mill vs CIT reported in (2014) 49 taxmann.com 363 (Andhrapradesh 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 Passi reported in (2013) 350 ITR 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.*

*4.5 It is pertinent to note that the primary object of enacting section 40A(3) was two fold, firstly, putting a check on trading transactions with a mind to evade the liability to tax on income earned out of such transaction and, secondly, to inculcate the banking habits amongst the business community. Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequence, which were to befall on account of non- observation of section 40A(3) must have nexus to the failure of such object. Therefore, the genuineness of the transactions it being free from vice of any device of evasion of tax is relevant consideration.*

*4.6. The Hon'ble Apex Court in the case of CIT vs Swastik Roadways reported in (2004) 3 SCC 640 had held that the consequences of non-compliance of Madhya Pradesh Sales Tax Act , which were intended to check the evasion and avoidance of sales tax were significantly harsh.*

*The court while upholding the constitutional validity negated the existence of a mens rea as a condition necessary for levy of penalty for non-compliance with such technical provisions required held that "in the consequence to follow there must be nexus between the consequence that befall for non-compliance with such provisions intended for preventing the tax evasion with the object of provision before the consequence can be inflicted upon the defaulter." The Supreme Court has opined that the existence of nexus between the tax evasion by the owner of the goods and the failure of C & F agent to furnish information required by the Commissioner is implicit in section 57(2) and the assessing authority concerned has to necessarily record a finding to this effect before levying penalty u/s. 57(2).*

*Though in the instant case, the issue involved is not with regard to the levy of penalty, but the requirement of law to be followed by the assessee was of as technical nature as was in the case of Swastik Roadways (3 SCC 640) and the consequence to fall for failure to observe such norms in the present case are much higher than which were prescribed under the Madhya Pradesh Sales Tax Act. Apparently, it is a relevant consideration for the assessing authority under the Income Tax Act that before invoking the provisions of section 40A(3) in the light of Rule 6DD as clarified by the Circular of the CBDT that whether the failure on the part of the assessee in adhering to requirement of provisions of section 40A(3) has any such nexus which defeats the object of provision so as to invite such a consequence. We hold that the purpose of section 40A(3) is only preventive and to check evasion of tax and flow of unaccounted money or to check transactions which are not genuine and may be put as camouflage to*

*evade tax by showing fictitious or false transaction. Admittedly, this is not the case in the facts of the assessee herein. The payments made in cash to Shri. Amit Dutta had been duly acknowledged by him in an independent deposition given by him before the Learned AO which was admittedly taken behind the back of the assessee. It is also pertinent to note that the Hon'ble Rajasthan High Court in the case of Smt.Harshila Chordia vs ITO reported in (2008) 298 ITR 349 (Raj) had held that the exceptions contained in Rule 6DD of Income Tax Rules are not exhaustive and that the said rule must be interpreted liberally.*

*4.7. The assessee has also given the income tax assessment particulars of Amit Dutta before the Learned AO. Moreover, the Learned AO himself had taken deposition from Sri Amit Dutta u/s 131 of the Act wherein he had confirmed the receipt of monies in cash as well as by cheque / DD from the assessee. Hence the acknowledgement of the payments made by the assessee by the payee is proved beyond doubt. The assessee had also stated that the payee had duly included these payments as his receipts in his returns.*

*4.8. We are unable to buy the argument of the Learned AR that the assessee had made payment to his agent Mr.Arnit Dutta for purchase of sim cards and others and hence would fall under the exception provided in Rule 6DD(k) of the IT Rules. For the sake of convenience, Rule 6DD(k) is reproduced herein below:-*

*"Rule 6DD(k) of the IT Rules 1962 6DD. No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to 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:-*

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*(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;"*

*The said rule says that if the payment is made by a person to his agent who is required to make payment in cash for goods and services on behalf of such person: Admittedly, Shri.Arnit Dutta is only the agent of Hutchison Essar Ltd and not the assessee as could be seen very clearly from the Associate Distributor Agreement entered into by the assessee which is on records before us and before the lower authorities. Hence the payment made by the assessee to Shri.Arnit Dutta would not fall under the exception clause of Rule 6DD(k).*

*4.9. We find that one of the grounds raised by the assessee is violation of principles of natural justice on the part of the Learned CIT(A) to enhance the assessment without giving enhancement notice to the assessee. But from the order of the Learned CITA, it is specifically mentioned that the assessee was given due opportunity and show cause notice for enhancement of assessment by Rs. 54,01,473/- for making further additions on account of section 40A(3) of the Act. We find that the assessee had not come on any affidavit before us refuting this finding. Hence the enhancement made by the Learned AO cannot be faulted with on violation of principles of natural justice.*

*4.10. In view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we have no hesitation in deleting the addition made in the sum of Rs. 60,50,8901- and 54,01,473/- u/s 40A(3) of the Act. Accordingly, the grounds raised by the assessee in this regard are allowed.*

*5. In the result, the appeal of the assessee is allowed.”*

*7. After perusing the aforesaid decision of the ITAT, Kolkata, we are of the considered view that the issue in dispute is also squarely covered by the aforesaid decision, because the facts and circumstances of the present case are exactly similar and identical to the aforesaid case law. Therefore, respectfully following the aforesaid decision dated 18.11.2015 of the ITAT, 'B' Bench, Kolkata passed in ITA No. 1448/Kol/2011 AY 2008-09 in the case of Sri ManoranjanRaha vs. ITO,the order of the Ld. CIT(A) is upheld and grounds raised by the Revenue stand rejected.*

*7.1. We further find that assessee has filed a copy of Application under Rule 27 of Appellate Tribunal Rules, 1963 dated 21.6.2017, but at the time of hearing, he has not pressed the same, hence, the same is dismissed as such.*

*8. In the result, the appeal of the Revenue is dismissed.”*

5.1 We further find that similarly, the ITAT, 'D' Bench in the case of M/s KGL Network (P) Ltd. Vs. ACIT decided on 02.7.2018 in ITA No. 301/Del/2018 (AY 2014-15) on identical issue has followed the aforesaid decision of the Delhi Bench in the case of ACIT, Central Circle-2, Faridabad vs. M/s. Marigold Merchandise (P) Ltd. (supra).

5.2 Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid precedents, we set aside the orders of the authorities below and delete the addition in dispute and allowed the ground raised by the Assessee.

6. In the result, appeal of Assessee is allowed.

Order pronounced on 31-07-2019

Sd/-  
**(DR. B.R.R. KUMAR)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(H.S. SIDHU)**  
**JUDICIAL MEMBER**

New Delhi, Dated 31<sup>st</sup> July, 2019

SRB/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT, Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :  
Delhi.