

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA Nos.74 to 76/Bang/2022
Assessment Years: 2011-12 to 2013-14

M/s. ACE Developers 13-12-1395/24 & 25 1 st Floor, Inland Ornate Navabharath Circle Kodialbail Mangaluru 575 003 Karnataka PAN NO : AAMFA7843H	Vs.	Deputy Commissioner of Income-tax Central Circle-1 Mangaluru
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheethal Borkar, A.R.
Respondent by	:	Shri A. Ramesh Kumar, D.R.

Date of Hearing	:	13.07.2023
Date of Pronouncement	:	27.07.2023

O R D E R

PER BENCH:

These appeals by assessee are directed against different orders of CIT(A) for the assessment years 2011-12 to 2013-14, all are common dated 2.12.2021. The grounds of these appeals are common. Hence, these appeals are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. The assessee has raised common grounds except change in figures in these appeals. Hence, we will consider the grounds in assessment year 2011-12, which are as follows:

1. *The learned CIT(A)-2, Panaji erred in Passing the Order in the manner he did.*

2. *The learned CIT(A)-2, Panaji erred in upholding the additions of Rs.47,33,332/- by the Assessing Officer by making disallowance under section 40A(3) of the income tax Act 1961.*

3. *The learned CIT(A)-2, Panaji has failed to appreciate the fact that, payment of Rs.47,33,332/- has made on account of commercial expediency and the Legislature intention to bring the provisions of section 40A(3) was only to curb black money but genuineness of transaction, business expediency and genuine hardship has also been kept as relevant consideration by way of above provision read with Rule 6DD of the Income tax Rules, 1962.*

4. *The learned CIT(A)-2, Panaji has failed to appreciate the fact that, Rule 6DD of the IT Rules 1962, which provides for situations under which disallowance under section 40A(3) shall not be made and no payment shall be deemed to be the profits and gains of business or profession.*

5. *The learned CIT(A)-2, Panaji has grossly overlooked the following decisions, which are squarely applicable to appellant's case.*

1. *M.K. Agrotech Private Limited Vs. ACIT (109 [Taxmann.com](#) 337) (Kar)*

2. *Pr. CIT Vs. GEE Square Exports (100 [Taxmann.com](#) 462) (SC)*

6. *The learned CIT(A)-2, Panaji has failed to comprehend that, additions/disallowances can be made for this assessment year under 153C, since no incriminating material was unearthed during the course of search and admittedly original assessment has not abated as on date of search, as held in the following decisions.*

a) *CIT Vs. Lancy Constructions (237 [Taxman](#) 728).*

b) *CIT (Central)-111 Vs. Kabul Chawla (234 [Taxman](#) 300)*

c) *Canara Housing Development Co. Vs. Deputy Commissioner of Income-tax, Central Circle-I(1), Bangalore (49 [taxmann.com](#) 98)*

7. *The learned CIT(A)-2, Panaji has failed to appreciate that, the evidences unearthed were loose sheets and digital evidences, pen-drive, which has got no evidentiary value and legally inadmissible under Section 34 of the Indian Evidence Act as held in the following decisions.*

1. *Coinmon Cause (A Registered Society) Vs. Union of India [2017] (77 [Taxmann.com](#) 245) (SC).*

2. *Principal CIT, Central Ill Vs. Krutika Land (P) Ltd. 103 [taxmann.com](#) 9 (SC).*

3. *CIT Vs. P. V. Kalyansundaram (164 Taxman 78) (SC).*
4. *CIT, Mumbai Vs. Lavanya Land Private Limited (2017) 83 taxmann.com 161 (Bombay).*
5. *CIT, Bangalore Vs. IBC Knowledge Part (P) Ltd. (2016) 69 taxmann.com 108 (Karnataka).*

8. *The leaned CIT(A)-2, Panaji has erred in relying on various case laws, which are not at all applicable to the Appellant's case.*

9. *The Appellant craves leave to add, amend or alter any of the forgoing grounds.*

10. *For these and any other grounds that may be urged before the Hon'ble ITAT, it is prayed that the Hon'ble ITAT may allow the appeal with cost."*

3. The first grounds for our consideration are ground Nos.2 to 5. The ld. A.R. submitted the Assessee is a Partnership Firm consisting of husband and wife as partners carrying on the business of construction and sale of flats in agreement with the owners of the land. The assessee filed its return of income for the assessment year 2011-2012 on 10.11.2021 and the return was processed under section 143(1) of the Income-tax Act,1961 ['the Act' for short].

3.1 There was a search and seizure operation under section 132 of the Act conducted at the partners residential premises as well as survey under section 133A of the Act at the business premises of the Assessee on 24.6.2016. Based on the incriminating documents found during the source of search as well as survey proceedings, Assessing Officer of the opinion that, assessee had escaped its income for the assessment year under question. Hence, notice under section 148 of the Act was issued by reopening the assessment under section 147 of the Act. In response to the above notice, the assessee filed the return of income on 30.9.2018 and declared therein income of Rs.8,21,704/-. Subsequently, notices u/s. 143(2) and 142(1) of the Act were issued calling for details and assessment was concluded as ex-parte under section 144

r.w.s.147, vide order dated 24.12.2018. In the order of assessment, the Assessing Officer has made additions of Rs.47,33,332/- as disallowance made under section 40A(3) of the Act and thereby raised tax demand of Rs.28,99,579/-.

3.2 Being aggrieved by the above order, the Assessee had preferred an appeal before the Commissioner of Income tax (Appeals)-2, Panaji. The Commissioner of Income tax (Appeals) vide his order dated 02.12.2021 in Appeal No.CIT(A)-2/PNJ/10230/2018-19 has dismissed the appeal filed by the Assessee, upholding the additions made by the Assessing Officer as disallowance under section 40A(3) of the Act. The assessee submitted that the learned CIT (Appeals) has also overlooked the following facts and case laws relied by the assessee.

3.3 In respect of the additions made by the Assessing Officer amounting Rs.47,33,332/- as disallowance under section 40A(3) of the Act for the assessment year under question, based on the impounded diaries which disclosed that, (a) payments were made through bearer cheques to sub-contractors and (b) payment made in cash to counter parties other than the subcontractors, the ld. A.R. submitted as under.

a) Payment made to through bearer cheques:

- Payments by way of bearer cheques and cash payments being to sub contactors are being explained together since, the counter party involved are same.
- Sub-contractors engages specialist labour for special task such as centering and bar bending, etc.
- To this sub-contractor make daily payments to the specialized workers on a daily or weekly basis through cash.

Due to this exigency, the subcontractors insists upon cash payments.

- To fulfil the above need, assessee pay available day-to-day cash, to the said sub-contractors as an advance.
- Subsequently, sub-contractors will raise bill/invoices for the services rendered by them.
- At that point of time, bearer cheque will be issued for the net amount after deduction of TDS.
- At the time of withdrawal of this bearer cheque by the sub-contractor, the staff/partner of the assessee accompany the sub-contractor to the bank and take possession of the amount withdrawn. These amounts were once again utilised in the same manner as described amount.

b) Payment made to counter parties other than sub-contractors.

- Payments by way of cash is also made to non-sub-contractors, who are nothing but the labourers (counter party) directly employed by the assessee. Once the payments were made, counter party signs and acknowledge the receipts of amount in the dairy/note book. This being the genuine expenditure

All the above transactions and payments made in cash were noted in the daily/note books impounded during the time of survey.

3.4 The Id. A.R. submitted that in fact, the entire transactions mentioned the dairy/notes impounded during the survey were duly accounted in the books of the account of the assessee. These types of transactions were generally held in the construction contract business. Normally, labourers won't accept cheque/DD and hence,

assessee is rightly justifying the circumstances under which the payment was not practicable, or would have caused a genuine difficulty to the payee. Therefore, the assessee submitted that, when the genuineness of the payment is not in doubt and a case of business expediency made out, section 40A(3) cannot be invoked. There was no dispute as to the genuineness of the payments as to labour charges, being to identifiable persons, so that no disallowance under Section 40A(3) could be made. In support this, Assessee relied on Rule 6DD of the IT Rules 1962, which provides for situations under which disallowance under section 40A(3) shall not be made and no payment shall be deemed to be the profits and gains of business or profession.

3.5 The ld. A.R. submitted that in the assessee's case, the payment was made in exceptional and unavoidable circumstances or the payment by cheque or bank draft was not practicable or would have caused genuine difficulty-assessee made cash payments to its workers/sub-contractors to smooth carrying on its contract business in the tough competitive period. Almost, daily workers employed were migrating labourers from Bihar, Orrisa, West Bengal and North Eastern State of India and they insist for cash payments on daily basis.

3.6 The ld. A.R. relied on the following decisions, which are squarely applicable to the Assessee's case.

1. *M.K. Agrotech Private Limited Vs. AC1T (109 Taxmann.com 337) (Kar)*

Merely because purchases were made through uncrossed cheque/demand draft the same could not be considered as bogus so as to make disallowance under section 40A(3).

2. *Pr. CIT Vs. GEE Square Exports (100 Taxmann.com 462) (SC)*

3.7 The Id. A.R. referring to the provisions of Section 40A(3) of the Act submitted that the intent of bringing the said provisions was to curb the black money but genuineness of transaction, business expediency and genuine hardship has also been kept as relevant consideration by way of above provision. She submitted that the intention of the legislature behind introduction of Section 40A(3) of the Act was to curb the chances and opportunities to use or create black money and to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources or not. Section 40A(3) of the Act must not be read in isolation or to the exclusion of Rule 6DD and where this section must be read along with the Rule 6DD and if read together, it is clear that the provisions of Section 40A(3) are not intended to restrict the business activities. Therefore, this Appeal is filed against the order dated 02.12.2021 in Appeal Number CIT(A)-2/PNJ/10230/2018-19 of the Commissioner of Income tax (Appeals)-2, Panaji passed under Section 250 of the Income tax Act, 1961 requested that, the appeal be allowed.

3.8. Further, the Id. A.R. relied on the judgement of Punjab & Haryana High Court in the case of CIT Vs. Nikko Auto Ltd. (2002) (122 Taxman 874) (Punj. & Har.), wherein held as follows:

“There is no dispute about the identity of the payee. The said concern is a regular income-tax and sales-tax assessee and information about its sales-tax number as well as its Permanent Account Number had duly been furnished. The payments stand duly accounted for in the books of that concern and are fully verifiable. Thus, neither the genuineness of the transactions nor the genuineness of the parties is in dispute. The proviso to s. 40A(3) confers powers on the Board to notify in the IT Rules any exceptions to the aforesaid provision keeping in view the available banking facilities, business exigencies and other relevant factors. These exceptions have been set forth in r. 6DD. Since all the exceptional circumstances cannot be visualised, a residuary exception has been provided in sub-cl. (j). This sub-clause excludes from the purview of s. 40A(3) such cases where the assessee establishes that the payment could not be made by a crossed cheque or a draft due to exceptional and unavoidable

circumstances and also furnishes evidence to the genuineness of the payment and the identity of the payee. The Courts have been consistent in their view that the exceptional circumstances are to be seen from the point of view of a businessman keeping in view the exigencies of business. Still, further, the CBDT itself has issued a Circular No. 220 dt. 31st May, 1977 illustrating the circumstances in which residuary exceptions of r. 6DD(j) are attracted. One of the circumstances mentioned by the Board is that the seller is refusing to accept payment by way of crossed cheque or a draft. Para 4 of this circular provides that the requirement of r. 6DD(j) would stand satisfied if a letter is produced by an assessee in respect of each transaction falling within the categories mentioned in the said circular giving full particulars of his address, sales-tax registration number, if any, for the purpose of proper identification to enable the ITO to satisfy himself about the genuineness of the transaction. The AO has not doubted the requirement of cash by the payee for making payments to various Government Departments and also to the labour. Thus, insistence on payments by account payee cheque or account payee draft would have involved similar hazardous and cumbersome procedure. Thus, the case of the assessee is fully covered by the exceptions provided in s. 40A(3) r/w r. 6DD(j) and the Board circular. Therefore, no referable question of law arises out of the order of the Tribunal.”

4. The Id. D.R. submitted that assessee had made these cash payments in advance to Sub-contractors. It was also confirmed by the partners that these cash payments were not reflected in the cash book and this fact has been admitted by the partner during the course of survey. Since these payments made in cash to sub-contractors and have been not recorded in the regular books should be brought to tax as income of the assessee, even otherwise u/s 69C of the Act. Further, it was submitted that assessee cannot take plea that said payment was made in cash on the reason that banking facilities are not available as all the banking channels were very much available and in fact the assessee would issue cheques at subsequent dates to the parties and thereafter some employees of the assessee would go to the bank, encash the cheque and return the proceeds back to the assessee. This was corroborated by the statement of partner of the firm during the course of remand

proceedings on 10.3.2020, wherein he admitted that all the sub-contractors to whom bearer cheques were issued have bank accounts and that the bearer cheques were issued so as to facilitate the recovery of the cash already paid to the sub-contractors in cash, which are not recorded in the books of accounts, so that assessee could withdraw these amounts through its own employees and return it to the assessee. According to the Id. D.R., there is no exceptions provided in Rule 6DD of the I.T. Rules, 1962 to this kind of cash transactions. He relied on the order of the lower authorities.

5. We have heard the rival submissions and perused the materials available on record. In the present case, assessee is engaged in business of construction and sale of flats in agreement with the owner of the land. In the course of business of assessee, assessee made cash payment to sub-contractors in exceeds of Rs.20,000/- otherwise by cash or demand draft or crossed cheque or through electronic mode through bank. The assessee's plea is that payment has been made to sub-contractors who in turn make payment to their labourers towards their wages/salary. The weekly payment has been made on the work acknowledged by the site engineer. The contention of Id. D.R. is that these payments have been made to the sub-contractors by way of bearer cheques and in turn these cheques were been withdrawn through assessee's employees' and thereafter proceeds has been received back by the assessee. In fact, the assessee issued bearer cheque and in turn through its employees the amount has been withdrawn and received back by the assessee. Anyhow, the crux of the issue is that assessee has been paid the amount to sub-contractors in cash otherwise than by crossed cheque, Demand draft or electronic mode through bank. These payments made to the sub-contractors has been accounted by assessee and claimed as expenditure. There are certain judgements,

which are supporting the assessee fortifying their points, which are as follows:

- a) CIT & Anr. Vs. Balaji Engineering & Construction Works (323 ITR 351) (Karn.)
- b) Anupama Tele Services Vs. ITO (366 ITR 122) (Guj.)
- c) Harshila Chordia (298 ITR 349) (Raj.), wherein deleted the disallowance in case of genuine business transactions, wherein payments were made because of business expediency.

5.1 On the other hand, certain High Courts wherein confirmed similar disallowance including Bombay High Court in case of Madhav Govinda Dulshet Vs. ITO 259 Taxman 949 (Bom.), in case of Vaduganathan Talkies & Ors. Vs. ITO (428 ITR 224) (Mad) and in case of Bagmari Tea Company Ltd. Vs. CIT (25 ITR 640) (Calcutta), wherein confirmed the disallowance where the payment made in cash exceeding the stipulated amount notwithstanding the genuineness of transactions. In case of Balaji Engineering & Construction Works cited (supra), the Hon'ble Karnataka High Court held that payment made by the assessee being Principal Contractor to the sub-contractor pursuant to agreement under contract for which the provisions u/s 40A(3) of the Act read with Rule 6DD of the I.T. Rules cannot be applied.

5.2 In the present case, the case of the assessee is that payments which were made to sub-contractors were covered under clause (i) of IT Rules 6DD, which provides that no disallowance will be made where the payments are 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 important thing to be noted is that the payment must be by the assessee to his agent, who, in turn, pays to some third person on behalf of assessee for goods and services and the sub-contractors made daily payments to workers on a daily or weekly

basis through cash. On account of business exigency, the sub-contractors insisted upon cash payment and accordingly, the assessee paid through bearer cheques. Hence, business exigency of making cash payment on regular basis is also pleaded by the assessee in the instant case. To support this, assessee filed affidavits from Nagesh Poojary, S/o Mr. Gopal Kotian, Raghuveera, S/o Mr. Venkappa Salian, Manoj Kumar, S/o Mr. Mohan Gowda, which are kept on record in page Nos.63 to 68 of the assessee's paper book. In these affidavits, they have stated that they are sub-contractors of assessee firm and they insisted for cash payments to make payment to workers and confirmed the above payments. In such circumstances, it cannot be said that sub-contractors are not agents of the assessee for providing labours. Hence, on this count, the expenditure claimed on account of payment made to sub-contractors cannot be considered u/s 40A(3) of the Act as held by Hon'ble Karnataka High Court in the case of Balaji Engineering & Construction Works cited (supra) as the Tribunal being subordinate to jurisdictional High Court what matters for the Tribunal is to follow the binding precedent and delete the disallowance in case of cash payments exceeding the stipulated limit coupled with the fact that cash payments are made due to business expediency and being genuine transaction and the parties are identifiable, provisions of section 40A(3) cannot be applied. Accordingly, we are inclined to delete the addition made on this count.

5.3 There are one more payment to the labourers who are migrating labours earning wages and not permanently employed by the assessee, who have no bank accounts and these are payments made in exceptional circumstances as provided under Rule 6DD and these payments cannot fall under the purview of section 40A(3) of the Act and more so, the payments are genuine and parties are identifiable and the expenditure incurred is wholly and exclusively for the purpose of business on account of business exigency.

Accordingly, provisions of section 40A(3) of the Act cannot be applied and this addition is also deleted. Thus, the ground relating to additions made u/s 40A(3) of the Act is deleted. This ground of the appeal of the assessee is allowed.

6. Next ground nos.6 & 7 of the appeal in AY 2011-12, wherein assessee raised the grounds relating to validity of framing assessment u/s 148 of the Act. In this case, there was survey u/s 133A of the Act and information of cash payments collected during the search and these documents were not unearthed during search u/s 132 of the Act. There is no question of initiating proceedings u/s 153C of the Act. Hence, the ground No.6 of the assessee's appeal is dismissed accordingly.

7. With regard to ground No.7, according to the ld. A.R., evidences unearthed were loose sheets, digital evidence, Pen drive, which have got no functional value and not admissible u/s 34 of the Evidence Act. In our opinion, this ground of the assessee is totally misconceived. The documents mentioned herein are the evidences as per provisions of section 2(12A) of the Act, which reads as follows:

“Section 2(12A): books or books of account” includes ledgers, day-books, cash books, account-books and other books, whether kept [in the written form or in electronic form or in digital form or as print-outs of data stored in such electronic form or in digital form or in] a floppy, disc, tape or any other form of electro-magnetic data storage device.”

Accordingly, this ground of assessee is also dismissed.

8. Ground Nos.8 to 10 are general in nature, which do not require any adjudication.

9. In the result, the all the appeals of the assessee are partly allowed.

Order pronounced in the open court on 27th July, 2023

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 27th July, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.