

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 10/Ind/2023
(Assessment Year:2014-15)

M/s. Essargee Construction Pvt. Ltd. A-10, Mezenine Floor Essarjee House Bhopal	Vs.	ITO 1(5) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAACE 8852F		
Assessee by	Shri Manoj Fadnis, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	31.07.2023	
Date of Pronouncement	03.08.2023	

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 23.11.2022 of Commissioner of Income Tax(Appeals), National Faceless Appeal Centre, Delhi for Assessment Year 2014-15. The assessee has raised following grounds of appeal:

“1.That the ld. Commissioner of Income Tax (Appeals). National Faceless Appeal Centre, Delhi has passed the order without giving adequate time for giving specific replies in support of the appeal and therefore the said order is bad in law as principles of natural justice have not been adhered to

2.1 That the ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi has erred in confirming the order of ld.

AO to the extent of Rs. 2,75,000/- being payment made to the farmers for purchase of land.

2.2 That the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi has erred in confirming the order of Id. AO to the extent of Rs. 24,500/- being payment made to M/s Shrini Automobiles.

3.1 That the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi has passed the order mechanically and without taking on record the specific reasons for the year under appeal for payment of remuneration to the directors.

3.2 That the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi has erred in confirming the decision of the Id. AO who has erroneously considered that the enhancement in remuneration should lead to enhanced benefits to the company in the very same year.

3.3 That the Id. AO has disallowed 30 per cent of the Total of directors' salary which is ad hoc in nature and is not in accordance with the facts of the case and the provisions of law.

2. Ground no.1 is general in nature which has not been pressed by the Ld. AR of the assessee during the course of hearing therefore, no specific adjudication is required on this ground.

3. Ground no.2 is regarding disallowance of Rs.2,75,000/- u/s 40A(3) of the Act on account of cash payment to the farmers/land owners. During the course of scrutiny assessment the AO noted that the assessee has made cash payments to various parties in excess of Rs.20000/- as prescribed the limit envisaged in the provisions of section 40(A)(3) of the Act. The AO accordingly made disallowance of the payment made by the assessee to ten parties included the electricity expenses and vehicle repair expenses. On appeal the Ld. CIT(A) has deleted the disallowance made by the AO on account of electricity expenses but confirmed the other disallowance made by the AO.

4. Before Tribunal the Ld. AR of the Assessee has submitted that the assessee has purchased two parcel of land vide two sale deeds both dated 27.03.2014. He has referred to the details of the cash payment and

submitted that the payment of Rs.25000/- each to seven co-owners in respect of the one land parcel was paid as token money out of the total sale consideration of Rs.4,05,30,000/- and balance was paid in Cheque to each of the seven sellers. Similarly in case of second land parcel the assessee has paid sum of Rs.1 lac in cash out of the total consideration of Rs.79,10,000/-. Thus, Ld. AR has submitted that the cash payment made by the assessee was only a token amount at the time of deal which is a tradition and practice in this business without which the parties are not bound by their promise to strict to the deal. He has further submitted that at the time of initial negotiation and deal it is not possible to make token payment in Cheque and therefore, a minor amount of cash payment as a token money has been paid due to business expediency and the same would not attract the provision of section 40A(3) of the Act.

5. He has further submitted that the AO has not disputed the genuineness of the transactions as it is duly recorded in the sale deeds and payment was made to the land owners who are parties to the registered sale deed. Thus, the transactions and genuineness of the payment of cash is not in dispute. The identity of the payee is also not disputed by the AO as it is recorded in the sale deed. Therefore, when the payment was made to the land owners as token money at the time of initial negotiation for purchase of land and the entire balance amount has been paid through Cheque and all particulars are recorded in the sale deed then the disallowance is not warranted u/s 40A(3) of the Act. He has relied upon the decision of Hon'ble Rajasthan High Court in case of Smt. Harshila Chordia vs. ITO 298 ITR 349 and submitted that the Hon'ble High Court has observed that the assessee has proved the payment are made to the seller and identity of the payee have also been proved. Once the assessee produced all the details and record for the purpose of proper identification to enable the ITO to satisfy himself about the genuineness of the transactions then the disallowance u/s 40A(3) is not justified. The Ld. AR relied upon the judgment of Hon'ble jurisdictional High Court in case of CIT vs. Achal Alloys (P) Ltd. 218 ITR 46 and submitted that the Hon'ble

High Court has held that where the payments in cash were duly signed by the payee and the instance on making cash payments was founded on fulcrum that payees did not have any bank account . Further the genuineness of the payments was not exposed to any doubt then the disallowance u/s 40A(3) is not justified. Thus, Ld. AR has pleaded that when the transaction is genuine and identity of the payee is not in dispute then the disallowance is not justified. He has also relied upon the order of this tribunal date 11.04.2019 in assessee's own case arising from original assessment order passed u/s 143(3) in ITANo.900/Ind/2016 and submitted that the Tribunal has deleted the addition made by AO u/s 40A(3) of the Act in respect of the cash payment.

6. On the other hand, ld. DR has submitted that the case law relied upon by the assessee are not applicable in the facts of the present case. He has further submitted that there was no business expediency as pleaded by the Ld. AR of the assessee when the subsequent payment was made in Cheque then the initial payment also could have been made in Cheque. The case of the assessee does not fall in any of the exceptions incorporated in Rule 6DD of the Income Tax Rules.

7. Ld. DR has referred to the finding of the Ld. CIT(A) and submitted that the genuineness of the transaction is not relevant for disallowance u/s 40A(3) of the Act. In support of his contention he has relied upon the judgment of Hon'ble Madras High Court in case of Vaduganathan Talkies v. ITO 428 ITR 224 (Mad) and Hon'ble Karnataka High Court in case of Nam Estates Pvt. Ltd. v. ITO (2020) 428 ITR 186 . He has also relied upon the judgment of Hon'ble Supreme Court in case of Attar Singh Gurmukh Singh vs. ITO 191 ITR 667. He has relied upon the orders of the authorities below.

8. We have considered the rival submission as well as relevant material on record. It is evident from the record that the assessee has paid cash of Rs.25000/- to seven persons and Rs.1 lac to another person the details of which are given by the AO in the assessment order as under:

<i>S.No.</i>	<i>Date</i>	<i>Name of Party</i>	<i>Cash payment</i>
1	30.12.2013	Nawal Singh	25000/-
2	30.12.2013	Jhanak Singh	25000/-
3	05.01.2014	Ganpat Singh	25000/-
4	05.01.2014	Suraj Singh	25000/-
5	05.01.2014	Phool Bajaj	25000/-
6	05.01.2014	Sarju Bai	25000/-
7	05.01.2014	Seema Bai	25000/-
8	30.12.2013	Sewa Ram	100000/-
9	15.10.2013	Electricity Ex. South Block	26658/-
10	19.10.2013	Shirni Automobile	24500/-
<i>Total</i>			326158/-

9. The first seven payments of Rs.25,000/- each are made by the assessee in respect of the land purchased from these persons, vide sale deed dated 27.03.2014 for total consideration of Rs.4,05,30,000/-. It is evident from the sale deed that this amount of Rs.25000/- each paid by the assessee is also reflected in the sale deed to these seven persons and balance purchase consideration was paid through Cheques as per details given in the sale deed itself. Therefore, the payment was made as token amount at the time of initial negotiation which is almost three months prior to the date of sale deed and thus we find merit and substance in the explanation of the assessee that the token payment was made at the time

of initial negotiation with the land owner and thereafter the sale deed was executed wherein the payment of total consideration of Rs.4,05,30,000/- has been explained with full details including these payments of Rs. 25000/- each to these co-owners. Similarly a sum of Rs.1 lac was paid by the assessee to one Shri Sevaram and subsequently the sale deed dated 27.03.2014 was executed between the assessee and said Shri Sevaram wherein the total consideration of Rs.79,10,000/- has been shown including a sum of Rs.1 lac paid in cash. Therefore, the explanation of the assessee that these cash payments were made as token money at the time of initial negotiation of deal with land owners and thereafter the land were purchased by the assessee through registered sale deed. These facts as evident from the registered sale deed clearly shows that the payments made at the time of initial negotiation are due to business expediency of the assessee. It is relevant to refer the first proviso to section 40A(3) and (3A) which reads as under:

“Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section 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, for use of electronic clearing system through a bank account for through such other electronic mode as may be prescribed ”], exceeds ten thousand rupees.] in such cases and under such circumstances as may be prescribed”, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors:”

10. The above proviso carves out an exception in such cases and under such circumstances as may be prescribed (Rule 6DD), having regard to the nature and extent of banking facilities available consideration of business expediency and other relevant factors. The Hon’ble Supreme Court in case of Attar Singh Gurmukh Singh vs. ITO as relied upon by the Ld. DR has also considered this aspect in para 7 as under:

“In our opinion, there is little merit in this contention. [Section 40A\(3\)](#) must not be read in isolation or to the exclusion of Rule 6DD. The Section must be read along with the Rule. If read together, it will be clear that the provisions are not intended to restrict the 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 on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources. The terms of [Section 40A\(3\)](#) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The 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 the business transactions and to prevent the use of unaccounted money or reduce the chances to use black-money for business transactions. See: [Mudiam Oil Company v. ITO](#), [1973] 92 ITR 519 A.P. If the payment is made by a crossed cheque drawn on a bank or a crossed bank draft then it will be easier to ascertain, when deduction is claimed, whether the payment was genuine and whether it was out of the income from disclosed sources. In interpreting a taxing statute the Court cannot be oblivious of the proliferation of black-money which is under circulation in our country. Any restraint intended to curb the chances and opportunities to use or create black-money should not be regarded as curtailing the freedom of trade or business.”

11. Thus, the Hon’ble Supreme Court has observed that section 40A(3) must not read in isolation or to the exclusion of Rule 6DD and co-joined reading of this section and rule 6DD makes it clear that the provisions are not intended to restrict the business activities. Further the payments by crossed Cheque or bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or it was out of income from disclosed sources. Thus, the Hon’ble Supreme Court has observed that the consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of this section. It is open to the assessee to furnish to the satisfaction of the AO 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. By considering the judgment of Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh vs. ITO(supra) the Hon'ble Gujarat High Court in case of Anupam Tele Services vs. ITO (supra) has analysed the provisions of section 40A(3) with Rule 6DD of Income Tax Rules 1962 as under:

“18. Rule 6DD of the IT Rules, 1962 provides for situations under which disallowance under s. 40A(3) shall not be made and no payment shall be deemed to be the profits and gains of business or profession under the said section. Amongst the various clauses, cl. (i) which is relevant, read as under:

(i) where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike:

19. It could be appreciated that s. 40A and in particular sub-cl. (3) thereof aims at curbing the possibility of on- money transactions by insisting that all payments where expenditure in excess of a certain sum (in the present case twenty thousand rupees) must be made by way of account payee cheque drawn on a bank or account payee bank draft.

20. As held by the apex Court in case of Attar Singh Gurmukh Singh (supra). In our opinion, there is little merit in this contention. Sec. 40A(3) must not be read in isolation or to the exclusion of r. 6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading activities. Sec. 40A(3) only empowers the AU 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 on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources. The terms of s. 40A(3) are not absolute. Considerations 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 AO the circumstances under which the 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 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 s. 40A(3) and r. 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."

21. It was because of these considerations that this Court in case of Hynoup Foods (P) Ltd. (supra) observed that the genuineness of the payment and the identity of the payee are the first and foremost requirements to invoke the exceptions carved out in r. 6DDG) of the IT Rules, 1962.

22. In the present case, neither the genuineness of the payment nor the identity of the payee were in any case doubted. These were the conclusions on facts drawn by the CIT(A). The Tribunal also did not disturb such facts but relied solely on r. 600) of the Rules to hold that since the case of the assessee did not fall under the said exclusion clause nor was covered under any of the clauses of r. 6DD, consequences envisaged in s. 40A(3) of the Act must follow.

23. In our opinion, the Tribunal committed an error in coming to such a conclusion. We would base our conclusions on the following reasons:

(a) The paramount consideration of s. 40A(3) is to curb and reduce the possibilities of black money transactions. As held by the Supreme Court in Attar Singh Gurmukh Singh (supra), s. 40A(3) of the Act does not eliminate considerations of business expediencies.

(b) in the present case, the appellant assessee was compelled to make cash payments on account of peculiar situation. Such situation was as follow-

(1) the principal company, to which the assessee was a distributor, insisted that cheque payment from a co-operative bank would not do, since the realization takes a longer time;

(ii) the assessee was, therefore, required to make cash payments only.

(iii) Tata Tele Services Ltd. assured the assessee that such amount shall be deposited in their bank account on behalf of the assessee;

(iv) It is not disputed that the Tata Tele Services Ltd. did not act on such promise

(v) if the assessee had not made cash payment and relied on cheque payments alone, it would have received the recharge vouchers delayed by 4/5 days and thereby severely affecting its business operations.

We would find that the payments between the assessee and the Tata Tele Services Ltd, were genuine. The Tata Tele Services Ltd. had insisted that such payments be made in cash, which Tata Tele Services Ltd, in turn assured and deposited the amount in a bank

account. In the facts of the present case, rigors of s. 40A(3) of the Act must belifted.

24. We notice that the Division Bench of the Rajasthan High Court in case of Smt. Harshila Chordia vs. ITO (2007)208 CTR (Raj) 208 (2008) 298 ITR 349 (Raj) had observed that the exceptions contained in r. 6DD are not exhaustive and that the said rule must be interpreted liberally.”

12. The Hon’ble High Court has observed that if section 40A(3) is read together with rule 6DD it will be clear that the provisions are not intended to restrict business activities. The payment by crossed cheque or crossed bank draft is insisted to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of income from undisclosed sources. Considerations 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. The Hon’ble High Court further observed that provision of section 40A(3) and Rule 6DD are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the changes to use black money for business transactions. A similar view has been taken by Hon’ble Rajasthan High Court in case of *Smt. Harsila Chordia vs. ITO (supra)* in para 13 to 20 as under:

“13. "Clause (j) of Rule 6DD of the Income-tax Rules, 1962, provides that no disallowance under [Section 40A\(3\)](#) of the Income-tax Act, 1961, shall be made where the assessee satisfies the Income-tax Officer that the payment could not be made by way of a crossed cheque drawn on a bank or by a crossed bank draft-

a. due to exceptional or unavoidable circumstances; or b. because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof, and also furnishes evidence to the satisfaction of the Income-tax Officer as to the genuineness of the payment and the identity of the payee.

14. About this clause, many doubts were raised and enquiries were directed to the Board as to what shall constitute exceptional and unavoidable circumstances within the meaning of Clause (j). That led

to issuance of Circular by the Board on May 31, 1977 ([1977] 108 ITR (St.) 8), which is published in Taxmann, Vol. 1, 1988 Edition. Significantly paragraph 4 of the aforesaid Circular shows very clearly that all the circumstances in which the conditions laid down in Rule 6DD(j) could be applicable cannot be spelt out. However, some of them which will seem to meet the requirements of the said rule are as follows:

a. the purchaser is new to the seller; or b. the transactions are made at a place whether either the purchaser or the seller does not have a bank account; or c. the transactions and payments are made on a bank holiday; or d. the seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller ; or e. the seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchase the goods; or f. specific discount is given by the seller for payment to be made by way of cash.

15. It was further clarified in paragraph 6 that the above circumstances are not exhaustive but illustrative.

16. Therefore, in our opinion, the Tribunal was clearly in error in not travelling beyond the circumstances referred to in paragraph 4 of the Circular and to consider the explanation submitted by the assessee on its own merit.

17. Significantly paragraph 5 reproduced hereinbelow gives a clear indication that Rule 6DD(j) has to be liberally construed and ordinarily where the genuineness of the transaction and the payment and identity of the receiver is established, the requirement of Rule 6DD(j) must be deemed to have been satisfied. Paragraph 5 of the Circular reads as under [1977] 108 ITR (St.) 8, 9:

5. It can be said that it would, generally, satisfy the requirements of Rule 6DD(j), if a letter to the above effect is produced in respect of each transaction falling within the categories listed above from the seller giving full particulars of his address, sales tax number/permanent account number, if any, for the purposes of proper identification to enable the Income-tax Officer to satisfy himself about the genuineness of the transaction. The Income-tax Officer will, however, record his satisfaction before allowing the benefit of Rule 6DD(j).

18. It appears that fulfilment of the conditions of paragraph 5 of the circular has clearly escaped the attention of the Tribunal. The circular clearly indicates that ordinarily where the Income-tax Officer is satisfied about the genuineness of the transaction and payment and identification of the cash payment is established, the Income-tax

Officer shall record his satisfaction about the fulfilment of the conditions for allowing the benefit of Rule 6DD(j). Apparently, [Section 40A\(3\)](#) was intended to penalize the tax evader and not the honest transactions and that is why after framing of Rule 6DD(j), the Board stepped in by issuing the aforesaid circular.

19. This clarification, in our opinion, is in conformity with the principle enunciated by the Supreme Court in CTO v. Swastik Roadways as noticed above.

20. In this case, there is no dispute about the genuineness of the transactions and the payment and identity of the receiver are established. Therefore, the case clearly fell within the parameters of paragraphs 4 and 5 of the aforesaid circular read together.

13. Therefore, if the assessee has brought on record to establish genuineness of the transactions and payment as well as identity of the payee to the satisfaction of the AO then the benefit of Rule 6DD is available. Hon'ble High Court has observed that section 40A(3) was intended to penalize the tax evader and not honest transactions and that is why after framing Rule 6DD(j) the CBDT steps in by issuing the circular dated 31st May 1977 reported in 108 ITR (ST) 8. The Hon'ble jurisdictional High Court in case of CIT vs. Achal Alloys (P) Ltd.(supra) has also considered this issue and held as under:

"Section 40A(3) provides as under:

"Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1965) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, such expenditure shall not be allowed as a deduction."

contains the proviso as under:

It Provided further that no disallowance under this sub-section shall be made where my payment in a sum exceeding ten thousand rupees is made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of having facilities available, considerations of business expediency and other relevant factors.

The Appellate Tribunal found that the genuineness of the payee has not been doubted by the Assessing Officer. It was found that the payment of the exceeding the limit was made under exceptional and unavoidable circumstances. Placing reliance on Porwal Udyog (India) v. CIT (1982) 135 ITR.991 (MP) it was found that no disallowance was permissible.

Why should every exercise begin with mistrust or no trust? In 1979, Ireland abolished wealth-tax, Germany, substantially lowered it. The U.S.A. cut capital gains tax and the UK reduced its maximum rate of personal tax from 83 to 60 per cent. In 1982, Sweden reduced its marginal rate of personal income-tax from 85 to 50 per cent. In this country, the Government purports to simplify the income-tax law but pursues the course, may be due to compulsions, in the opposite direction. The provision on hand is intended to destroy intentions of dealing with unaccounted moneys, the purpose behind insistence on cross-cheque or cross-draft is to assure and ensure "genuiner" of dealing and proper assessment of taxable income Even this provision has a permiso to mitigate the hardships.

We notice from the appellate order that the appellate authority found that all the purchases were duly entered in the register through inwards and the production has been accepted. It farther found that the genuineness of the payment was not exposed to any doubt Payments in cash were duly signed by the paynes and the insistence on making the cash payments is founded on the fulcrum that the payees did not have any bank account and that, being illiterates, required the payment in cash.

The Tribunal was this satesfied that no disallowance ought to be made in view of the facts and features fully covered by the provion to the aforesaid section.

" It is in the area of legislative ambiguities, yet not receding, that courts have to fill gaps, clear doubts and mingose hardships. From the words of Judge Learned Hand, spoken in Cabell v. Markham 11245] 148 F 28 737, 739, we get enough light to locate the correct path.

"It is one of surest indexes of a mature and developed jurisprudence to remember that statutes always have some purpose or object lo accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

There is no doubt about the purpose or object of the relevant provision. To accomplish it, we cannot ignore the second proviso engrafted to fill gaps and misgate hardships The Tribunal on appreciation of facts applied this proviso and held that disallowance of payments made to the sellers and consequat addition of equivalent amount to the income as returned were steps hostile to the purpose and object and that the assessee was required to be given the benefit

of such payments made in exceptional circumstances. Law lives on logic and as such illogicality, resting on technical view, it to be spurned.

This finding of fact, not shown to be perverse or perishable, reached by the Tribunal did not give, as held in CIT Ashoka Marketing LA [1976] 103 ITR 543 (SC) and CIT Korrika Penkalarmy and Sex (1971) 79 ITR 499 (SC), rise to any question of law.”

14. Therefore, the disallowance u/s 40A(3) cannot be made without considering the business expediency and other relevant factors falling in the exceptions given in Rule 6DD of I.T. Rules. The Coordinate Bench of this Tribunal in assessee's own case for A.Y.2010-11 arising from the original assessment order passed u/s 143(3) (supra) has considered this issue in para 8 to 10 as under:

“8. We have heard rival contentions and perused the records placed before us and gone through the paper book filed by the assessee. The issue raised in this appeal by the assessee revolves around the disallowance of Rs.5,40,000/- u/s 40A(3) of the Act. We observe that the assessee is into the business of purchase and sale of land and civil construction business. It purchased land from Smt. Anar Bai for a total consideration of Rs.36,00,000/-. Out of the total purchase consideration of Rs.36,00,000/- assessee paid cash of Rs.6,20,000/- (verifiable from the Essarjee Constructions Pvt.Ltd ITA No.900/Ind/2016 Registered sale deed as well as affidavit placed in the paper book). Out of the cash payment of Rs.6,20,000/- Ld. A.O has disputed only sum of Rs. 5,40,000/- which in view of Ld. A.O was payment for expenditure in cash exceeding Rs.20,000/-. The total transaction of purchase of land for Rs.36,00,000/- is not disputed and the complete details of consideration paid in cash and cheque are mentioned in the registry sale deed which has been executed before the Registering Authority and therefore the genuineness of the transaction cannot be doubted.

9. It is pleaded before us that the seller Smt. Anar Bai was not having a bank account on the date of receiving cash and subsequently when the account was opened the consideration was paid in various instalments by account payee cheques. This fact that Smt. Anar Bai was not having the bank account at the initial date of receiving the consideration in cash has not been disputed by the revenue authorities. The said cash payment was made by assessee for business expediency in order to confirm the purchase deal.

10. Therefore looking to the given facts and circumstances of the case the alleged cash payment of Rs.5,40,000/- comes under the exceptions provided in Rule 6DD of the IT Rules and thus both the lower authorities Essarjee Constructions Pvt.Ltd ITA No.900/Ind/2016 were not justified in sustaining the disallowance u/s 40A(3) of the Act and the same deserves to be deleted. We accordingly order so and allow Ground No.1 & 2 raised by the assessee.

10. Apropos the second plea raised in Ground No.3 of the assessee's appeal contending that the disallowance is not called for as the alleged amount was not claimed as an expenditure during the year becomes infructuous and merely academic as we have already deleted the disallowance u/s 40A(3) of the Act at Rs. 5,40,000/- while adjudicating Ground No.1 & 2 of instant appeal.”

15. Though the Ld. DR has relied upon the judgment of Hon'ble Madras High court as well as Hon'ble Karnataka High court however, the jurisdictional High Court is binding on the tribunal functioning at Indore. Accordingly, in the facts and circumstances as discussed above and relied upon the various decisions of Hon'ble jurisdictional High Court and Coordinate Bench of this Tribunal we decide this issue in favour of the assessee and consequently disallowance made by the AO u/s 40A(3) is deleted.

16. Ground no.3 is regarding disallowance made by the AO on account of salary/remuneration paid to the directors. The AO noted that the assessee has debited Rs.38,88,000/- and Rs.57,60,000/- in the profit and loss account on account of directors salary to Ms. Meenu Gupta and Mr. Sunil Gupta respectively. The AO questioned the justification and reasonableness of such huge amount paid to two directors in view of the provisions of section 40A(2)(b) of the Act and asked the assessee to furnish the specific details supporting documentary evidences. The AO has finally made disallowance of 30% of the total salary paid to these two directors amounting to Rs.28,94,400/-. On appeal the Ld. CIT(A) has confirmed the disallowance made by the AO.

17. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. An identical issue has been considered by this Tribunal in assessee's own case for A.Y.2012-13 vide order dated 31st July 2023 in ITANo.8/Ind/2023 in para 28 to 30 as under:

“28. We have considered the rival submission as well as relevant material on record. The details of qualification & experience of the directors and payments of the salary to them are given at page 84 to 86 as under:

Justification for Salary

1. Name of the Director : SUNIL KUMAR GUPTA
 - 1.1. Date of birth : 19/07/1967
 - 1.2. Age during FY 2013-14 : 47 Years
 - 1.3. Educational Qualification : B.E. (Civil) passed out in May 1988
 - 1.4. Employed with company since: 1996
 - 1.5. Nature of responsibilities : Shri Sunil Gupta is a qualified Engineer (B.E. Civil). He is the Managing Director of the Company and has the overall responsibilities regarding construction, finance and marketing.
- 1.6. Details of salary vis-à-vis Turnover/PBT/Total Assets :

Year	Salary	Total Turnover	Profit before Tax	Total Assets
FY 2010-11	14,40,000.00	9,73,61,150.50	1,31,17,918.06	8,28,18,133.11
FY 2011-12	27,31,500.00	10,00,75,630.00	1,14,44,298.84	14,90,14,033.84
FY 2012-13	45,12,600.00	7,57,45,981.00	84,67,881.21	21,08,60,814.63
FY 2013-14	57,60,000.00	5,63,77,883.00	21,91,815.11	37,16,74,710.38



[Handwritten signature]

2. Name of the Director : MEENU GUPTA
2.1. Date of birth : 24/04/1977
2.2. Age during FY 2013-14 : 37 Years
2.3. Employed with company since: 1999
2.4. Nature of responsibilities : Meenu Gupta has been engaged in the business since 1998. She has also varied business experiences, which is reflected in her return as well. She is a well-qualified graduate individual having vast experience in the business. She has actively devoted her time and knowledge to the business for 12-15 years. Further, as of now, the capabilities of male and female entrepreneurs shall not be discriminated; they are to be treated at par with their male counterparts.

She belongs to a business background family D/o Er. NR Gupta who deals in Ceramic Insulators and manufactures the same at his plant in the Industrial Area of Raebareli, Uttar Pradesh. Over there she looked after the business management and also took care of the marketing department and designed a distribution network for the products they manufactured. After her marriage in 1996, she moved to Bhopal, Madhya Pradesh, and joined Essarjee Constructions Pvt Ltd in 1998 as one of the Directors of the company. Considering her past experiences and ability to deal with clients she seemed to be a great match for the job role. She also helped us with setting up the HR Department.

2.5. Details of salary vis-à-vis Turnover/PBT/Total Assets :

Year	Salary	Total Turnover	Profit before Tax	Total Assets
FY 2010-11	11,52,000.00	9,73,61,150.50	1,31,17,918.06	8,28,18,133.11
FY 2011-12	18,00,000.00	10,00,75,630.00	1,14,44,298.84	14,90,14,033.84
FY 2012-13	30,06,000.00	7,57,45,981.00	84,67,881.21	21,08,60,814.63
FY 2013-14	38,88,000.00	5,63,77,883.00	21,91,815.11	37,16,74,710.38



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3. Name of the Director : GULAB CHAND SHAH
- 3.1. Date of birth : 20/06/1941
- 3.2. Age during FY 2013-14 : 74 Years
- 3.3. Educational Qualification : Diploma in Mechanical Engineering in the year 1974 (Retired from BHEL, Bhopal)
- 3.4. Employed with company since: 2005
- 3.5. Nature of responsibilities : Shri Gulab Chand Shah is a 75 year-old, exceptionally well-experienced personnel. He completed his Diploma in Mechanical Engineering from S.V. Govt. Polytechnic, Bhopal in 1974. He has been a part of our organization since 2005. Before that, he worked in BHEL Bhopal, Madhya Pradesh since 1960 and retired as a Senior Engineer in 2001. Being a Senior Engineer at BHEL he was technically sound and held a good rapport among the top executives. Considering the fact that most of our projects were in the vicinity of the BHEL area and hence our customer base. A person who worked with our potential customers for more than 4 decades would naturally know more about what their actual needs were. As a matter of fact, our sales went up tremendously after he joined us. He helped us design and execute well-thought floor plans and layouts.
- 3.6. Details of salary vis-à-vis Turnover/PBT/Total Assets :

Year	Salary	Total Turnover	Profit before Tax	Total Assets
FY 2010-11	4,32,000.00	9,73,61,150.50	1,31,17,918.06	8,28,18,133.11
FY 2011-12	8,55,000.00	10,00,75,630.00	1,14,44,298.84	14,90,14,033.84
FY 2012-13	13,23,000.00	7,57,45,981.00	84,67,881.21	21,08,60,814.63
FY 2013-14	16,56,000.00	5,63,77,883.00	21,91,815.11	37,16,74,710.38



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29. Thus, the assessee has explained the qualification and work experience as well as business knowledge of the directors who are responsible for overall business affairs of the assessee company. we further note that the AO has made disallowance of 40% of enhancement without doing any exercise to determine what should be

the fair salary to the directors having regard to the services they have render to the assessee company. The Chennai Benches of the Tribunal in case of Carmel Softech Pvt. Ltd. vs. ITO (supra) has considered an identical issue in para 6 as under:

“6. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the Tribunal in the case of The Bombay Samachar Pvt. Ltd., supra, has considered the issue of applicability of provisions of section 40A(2)(b) of the Act to the directors remuneration and held that this provision will not apply to the directors payment for holding that the payment is excessive or unreasonable in the absence of any material brought on record to demonstrate that the payment is actually excessive or unreasonable having regard to market rate for the goods, services or facilities availed or the business need of the assessee or commensurate with the benefit derived by the assessee. In the present case before us also the AO has not carried out any exercise for holding the payment of remuneration to the directors that the same is unreasonable or not in consonance with the payment of directors or remuneration. We note that in this year the turnover is at Rs.1,42,13,393/- and profit earned is at Rs.84,40,020/- and remuneration paid to these three directors are at Rs.75,07,380/-. Even it is accepted position that the directors have paid taxes on these remunerations on maximum margin rate and there is no revenue loss to the Department. In view of the above, we are of the view that in the absence of any findings by the AO that the directors remunerations are excessive and unreasonable, we reverse the orders of lower authorities and allow the appeal of assessee.”

30. It is matter of record that two of the directors are paying income tax at the maximum marginal rate and therefore, there is no revenue loss on this account. Accordingly in the facts and circumstances as discussed above and in view of the decision of the Chennai Benches of the Tribunal (supra), we are of the considered view that an ad hoc disallowance made by the AO without doing the necessary exercise of determination of the fair remuneration of the salary payment to the directors is not justified. Accordingly the disallowance made by the AO is deleted.

18. For the year under consideration both directors are paying maximum marginal rate of tax and therefore, there is no revenue loss on this account. Accordingly following the earlier order of this Tribunal in assessee's own case adhoc disallowance made by the AO without determining the fair remuneration/salary paid to the directors having

regard to their services rendered to the assessee company is not justified and the same is deleted.

19. In the result, appeal of assessee is allowed.

Order pronounced in the open court on 03 .08.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 03.08.2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore