

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य एवं श्री सुधीर पारीक, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RATHOD KAMLESH JAYANTBHAI, AM & SHRI SUDHIR PAREEK, JM

आयकर अपील सं./ITA. No. 1046/JPR/2024
निर्धारण वर्ष/Assessment Year : 2014-15

Surbhi Agarwal B-1, New Lite Colony, Tonk Road, Jaipur	बनाम Vs.	ITO, Ward 6(4), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ARHPA 8560 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Ashok Kumar Gupta, Adv.,
Sh. Shrawan Kumar Gupta, Adv. &
Sh. Puneet Pareek, Adv.
राजस्व की ओर से / Revenue by : Sh. Kamlesh Kumar Meena (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 17/12/2024
उदघोषणा की तारीख / Date of Pronouncement : 19/12/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

The present appeal is because the assessee was dissatisfied with the order of National Faceless Appeal Centre (NFAC), Delhi dated 28/05/2024 [for short CIT(A)] for assessment year 2014-15. The said order of Id. CIT(A) arises because the assessee challenged the order of assessment dated 30.11.2019 passed under section 143(3) r.w.s 263 of the Income Tax Act, by ITO, Ward 6(4), Jaipur [for short AO] in his case.

2. In this appeal, the assessee has raised following grounds: -

1. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the invalid and illegal action of Ld. AO while complete assessment proceeding is illegal, invalid and without jurisdiction and barred by limitation hence may kindly be quashed.

2. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making addition under section 40A(3) of the act, as the questioned transaction of cash payment does not comes under the basic condition as mentioned under section 40A(3) of the act, for their invocation, therefore complete assessment proceedings should be declared void ab initio,

3. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making the addition of Rs. 8,36,000/- on account of disallowance under section 40(A)(3) without appreciating the fact that the purchase made by the assessee through registered deeds and payment made to an identified seller.

4. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making the addition of Rs. 8,36,000/- on account of disallowance under section 40A(3) without appreciating the facts that the payments comes under the exception as specified under rule 6DD of Income Tax Rule,

5. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the impugned order u/s 143(3) dated 04.12.2019 is bad in law for that profit calculated under section 44AD not filled in ITR Form – 4 in column 34(i). Marley not filing the same column in the ITR Form not constitute any contravention of any provision of law and also not constitute basis of disallowance of expenses claimed under section 40A(3).

6. Under the fact and circumstances of the case to the Ld. AO was not justified in charging interest u/s 234B and 234C,

7. That the appellant reserved his right to add, amend, or alter the grounds of appeal on or before the date of appeal hearing.”

3. At the outset of hearing, the Bench observed that there is delay of 13 days in filing of the appeal by the assessee for which the Id. AR of the assessee filed an application for condonation of delay with following prayers:

"1. In this connection it is submitted that the applicant is an individual assessee. The assessee challenged the order dated 30/11/2019 passed by Ld. AO for the assessment year 2014-15 before the Ld. NFAC/CIT(A).

2. Thereafter, Id. NFAC passed an order dated 28/05/2024. Further as per date of order the appeal was to be filed on or before 27/07/2024 but the same has been filed online on 09/08/2024 if we count delay then it is about 13 days subject to following facts.

3. The delay in filing the appeal occurred because the assessee's counsel prepared the appeal documents and deposited ITAT appeal fees on 22/07/2024 and handed them over to the assessee's accountant for signatures. And the accountant misplaced the signed appeal documents, and as a result, new documents had to be signed, leading to the late submission of the appeal.

4. Thus, due to the aforesaid circumstances, the appeal got delayed, however, there is no negligence's on part of assessee or the counsels. In support of the above said contention, an affidavit of the accountant as well as assessee is enclosed.

5. It is submitted that, recently on 05/08/2024, the Hon'ble Supreme Court in the case of Mool Chandra v. UOI (CA No. 8435-8436 of 2024 (@ S.L.P. (Civil) Nos. 2733-2734 of 2024 dt. 5-8-2024) held that

"No litigant stands to benefit in approaching the courts belatedly. It is not the length of delay that would be required to be considered while examining the plea for condonation of delay, it is the cause for delay which has been propounded will have to be examined. If the cause for delay would fall within the four corners of "sufficient cause", irrespective of the length of delay same deserves to be condoned. However, if the cause shown is insufficient, irrespective of the period of delay, same would not be condoned."

6. It is submitted that the Hon'ble Supreme Court in the case of Collector, Land & Acquisition v. Mst. Katiji & Others (1987) 167 ITR 471 (SC) has advocated for a very liberal approach while considering a case

for condonation of delay. The following observations of the Hon'ble Court are notable:

"The legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of Justice-that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But, the message does not appear to have percolated down to all the other Courts in the hierarchy."

7. The abovementioned judgment is a leading case on the subject and has a binding force on all the officers/courts subordinate thereto.

8. The apex court have again reiterated that the expression "sufficient cause" should receive a liberal construction. The Hon'ble court has also held that advancing of substantial justice should be of prime importance. Kindly refer Vedbai vs. Shantaram Baburam Patil & Others 253 ITR 798 (SC).

Prayer: In view of above facts and circumstance and with the sympathy and settled legal position, the delay so caused may kindly be condoned."

4. During the course of hearing, the Id. DR not objected to assessee's application for condonation of delay and prayed that Court may decide the issue as deem fit in the interest of justice as delay is of 13 days only.

5. We have heard the contention of the parties and perused the materials available on record. The prayer by the assessee for condonation of delay of 13 days has merit and we concur with the submission of the assessee that he has

paid the appeal fees in time but due handling the papers it has no control over it which has resulted the delay. Thus, the delay of 13 days in filing the appeal by the assessee is condoned in view of the decision of Hon'ble Supreme Court in the case of Collector, land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) as the assessee is prevented by sufficient cause.

6. Succinctly, the fact as culled out from the records is that the assessment proceedings in the case of the assessee was completed u/s 143(3) of the Income Tax Act, 1961 at Rs. 59,33,000/- on 26.12.2016. The case of the assessee was selected for complete scrutiny through CASS and consequently, the notice u/s. 143(2) of the Income Tax Act, 1961 was issued on 29.07.2016 which was got served upon the assessee through registered post and online systems and email id. The assessee e-filed the return of income in Form ITR-4 declaring income of Rs. 6,64,130/- under the head 'income from business or profession' and 'income from other sources' for the assessment year under consideration. In this case, the Pr. Commissioner of Income Tax-2, Jaipur passed the order u/s. 263 of the Income Tax Act, 1961 on 18.03.2019 holding that the assessment order passed on

26.12.2016 was found as erroneous and prejudicial to the interest of the revenue. While doing so Id. PCIT on perusal of the ledger of purchase of property (Annexure no. 11 to 12) available on record filed with letter dated 20.12.2016, it is seen that the assessee has made a journal entry for Rs. 14,75,000/- for purchase of Plot No. T-158 on 02.09.2013 as per sale deed dated 02.09.2013 (document No. 2013400011544). As per this sale deed, the assessee has issued Cheque No. 928988 for Rs. 13,21,000/- of Oriental Bank of Commerce, Church Road, Jaipur (without date) and Rs. 1,54,000/- paid in cash for purchase of the plot. However, there is no date mentioned in the sale deed on which the payment of Rs.1,54,000/- was made in cash. Further, as per bank statement of Oriental Bank of Commerce for the period 1-4-2013 to 31-3-2014 available on record, no transaction of the aforesaid cheque is reflected. No enquiry regarding encashment of this cheque from the seller's bank statement has been made by the A.O. to verify whether actually the payment made through the aforesaid cheque has been encashed or not or dishonored or whether actually cash payment has been made attracting provisions of 40A(3). Thus, even though the case was selected for complete scrutiny, the A.O. failed to examine this issue in detail.

6.1 Consequentially, a notice u/s 142(1) of the Income Tax Act, 1961 along with the query letter u/s 142(1) was issued on 19.08.2019 to the assessee requiring the relevant information/details. In compliance to the notices/letters, the assessee filed a detailed submission vide letter dated 25.11.2019 contending that the assessee purchase the property through registered sale deeds, identity of the sellers and genuineness of the transactions are fully established and we submitted that where the genuineness of the payments which are as per the registered sale deeds are not doubted, no disallowance u/s 40A(3) could be made.

In the assessment proceeding she also contended that as she is covered under section 44AD of the Act as the turnover of the assessee is Rs.85.00 lacs which is within limit provided under section 44AD and the assessee has declared income from the business @ 8.99% which is above the minimum 8% of turnover. We also taken an another view that the plots for which cash payment has been made, were purchased through registered sale deeds, identity of the sellers and genuineness of the transactions are fully established and we submitted that where the genuineness

of the payments which are as per the registered sale deeds are not doubted, no disallowance u/s. 40A(3) could be made.

The assessee also filed the details of transactions made by which are under dispute are as under:-

S.No.	Date of purchase	Particulars	Purchases cost	Mode of payment	Amount paid	Date of payment	Nature of payment
1	13.12.2013	123, Sita Ram Vihar	719203.00	Cash	682000.00	28.9.12	Purchase Consideration
				Cash	37203.00	31.12.13	Registry Exp
2	02.09.13	T-158 Narayan Vihar	1532850.00	Cheque	1321000.00	10.7.12	Purchase Consideration
				Cash	140000.00	2.5.12	Purchase Consideration
				Cash	14000.00	2.9.13	Purchase Consideration
				Cash	57850.00	2.9.13	Registry Exp
Total			2252053.00		2252053.00		

As is evident from the above table that during the year under consideration, the assessee purchased the plot No.123, Sita Ram Vihar Vistar, Village-Ramsinghpura Urf Rampura, Tehsil Sanganer, Jaipur from Shri Kalyanmal Agarwal S/o Laxmi Narayan Agarwal, Vikas Kunj, Vikas Marg, Mansingpura, Tonk Road, Jaipur for cost of acquisition of Rs.6,82,000/- in cash through sale deed dated 31.12.2013 which was executed by Sub-Registrar-I, Jaipur valued the above property at Rs.6,83,148/-. The assessee also purchased the plot No.158, Naryan Vihar-T, Village-Shrigarpura, Tehsil-Sanganer, Jaipur from Shri Rishi Kumar Agarwal S/o Jai Prakash Agarwal, Maator Road, Petrol Pump, Kherthal, Alwar for cost of

acquisition of Rs.14,75,000/- in cash through sale deed dated 02.09.2013 which was executed by Sub-Registrar-VII, Jaipur valued the above property at Rs.14,75,000/- in which payment of Rs.13,21,000/- was paid through cheque No.928988 of Oriental Bank of Commerce, Church Road, Jaipur and remaining amount of Rs.1,54,000/- was paid in cash. As is evident that the assessee made the payment of Rs.6,82,000/- and Rs.1,54,000/- in cash in purchasing of above immovable properties in contravention to the provisions of section 40A(3) of the Income Tax Act, 1961 no deduction shall be allowed in respect of such expenditure". The facts of the case was verified from the record available in this office properly which is found that the assessee has made the violation of the provisions of section 40A(3) of the Income Tax Act, 1961 making the payment in cash more than Rs.20,000/- against the purchasing of above immovable property. Hence, the same were not considered as allowable and accordingly the same was added as income of the assessee.

The Id. AO contended that on perusal of the return of income filed by the assessee for the assessment year under consideration, the assessee filed the return of income in Form ITR-4 which is applicable for those assessee who has the income from salary,

income from house property, income from business or profession, capital gain and income from other sources in which the assessee had no claim the facility provided by the Act under the provisions of section 44AD of the Income Tax Act, 1961 while the space in column-34(i) given in the return of income for the claim u/s. 44AD of the Income Tax Act, 1961 but the assessee did not fill up the relevant column no.34(i) on the relevant page of the return of income in form No.ITR-4 filed by the assessee for the assessment year under consideration. After perusal of the past history of the assessee, the assessee filed a return of income in ITR-4 for the preceding years but no claim u/s. 44AD was made by the assessee. Without claiming the same, the same cannot be allowed. Considering the facts of the case, the cash purchase of Rs. 8,36,000/- made by the assessee was added to the total income of the assessee.

7. Aggrieved from the order of Assessing Officer, assessee preferred an appeal before the Id. CIT(A)/NFAC. Apropos to the grounds so raised the relevant finding of the Id. CIT(A)/NFAC is reiterated here in below:

“8.0 I have considered the arguments of the assessee. It is apt to

Thereafter a Show Cause Notice was issued by the Hon'ble PCIT under Revision u/s 263 of the Act, which was replied by the assessee, Order has been passed by the Hon'ble Pr.CIT-2 on 18/03/2019 by alleging the purchase of land as stock in trade in cash in contravention to the provisions of sec 40A(3) of the Act, and disallowing the deduction claimed u/s 80C of the Act. The aforesaid order was challenged by the assessee before Hon'ble ITAT who directed to AO to examine the 'Explanation' as furnished by the appellant before the then, vide their order dated 04/09/2019. Thereafter, assessment order u/s 143(3)/254/143(3) of the Act, was passed on 30/11/2019 by making an addition of Rs. 8,36,000/- on the pretext of disallowance of cash payment u/s 40A(3) of the act and added in the total income of the assessee in addition to previously assessed on 26/12/2016.

Aggrieved with this order a first Appeal has been filed by the assessee and the same has been decided by the Ld. NFAC (CIT (A)) vide order dated 08/05/2024.

Further aggrieved by the order of the Ld. NFAC (CIT (A)) dated 08/05/2024 the assessee preferred this instant appeal before your honour on following grounds which are mutually exclusive and without prejudice to each other.

GROUND OF APPEAL

1. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the invalid and illegal action of Ld. AO while complete assessment proceeding is illegal, invalid and without jurisdiction and barred by limitation hence may kindly be quashed.
2. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making addition under section 40A(3) of the act, as the questioned transaction of cash payment does not comes under the basic condition as mentioned under section 40A(3) of the act, for their invocation, therefore complete assessment proceedings should be declared void ab initio,
3. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making the addition of Rs. 8,36,000/- on account of disallowance under section 40(A)(3) without appreciating the fact that the purchase made by the assessee through registered deeds and payment made to an identified seller.
4. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the action of Ld. AO in making the addition of Rs. 8,36,000/- on account of disallowance under section 40A(3) without appreciating the facts that the payments comes under the exception as specified under rule 6DD of Income Tax Rule,

5. Under the facts and circumstances of the case Ld. CIT(A) grossly erred in confirming the impugned order u/s 143(3) dated 04.12.2019 is bad in law for that profit calculated under section 44AD not filled in ITR Form – 4 in column 34(i). Marley not filing the same column in the ITR Form not constitute any contravention of any provision of law and also not constitute basis of disallowance of expenses claimed under section 40A(3).

6. Under the fact and circumstances of the case to the Ld. AO was not justified in charging interest u/s 234B and 234C,

That the appellant reserved his right to add, amend, or alter the grounds of appeal on or before the date of appeal hearing,

Ground No.2;

At the culmination of assessment order the Ld. AO, making the addition on account of disallowance of Rs. 8,36,000/- on a/c of violation of u/s 40A(3) has observed that during the year under consideration the assessee made some payments in Cash for purchasing of two plots as part of stock in trade to be presumed indulged in real estate business. He further observed that assessee does not comes under section 44AD because he did not fill the column-34(i) of Form ITR-4 though he offered Income from real estate business @8.99% as compare to 8% of total turnover, to be required under section 44AD of the Income Tax Act. It is also notable that aforementioned assessment proceedings was being done under the direction of Honorable ITAT vide their order dated 04/09/2019 through which he directed to Ld. AO to verify the explanation of the assessee and then decide the issues.

It also notable that the Ld. AO decide only single explanation regarding applicability u/s 44AD of the act while assessee raised many other grounds also before the then which the Ld. AO has blindly ignored and did not give an ear which is certainly violation of natural justice therefore complete addition should be deleted.

Submission;

Detail facts of the case:

1. The assessee filed her income tax return for the AY 2014-15 on 16/09/2014 which got revised on 22.07.2015 declaring Total income of Rs. 6,64,130/-comprising income from business and profession (Real Estate) and income from other sources Copy of Acknowledgement of such ITR along with complete Form, computation of total Income and Financial Statements are being annexed as Annexure 1(PB-1-33).

2. Thereafter, the case was selected under CASS for complete scrutiny and Notice u/s 143(2) was issued on 29.07.2016 and notice u/s 142(1) was issued on 04/08/2016.

3. The proceedings were completed and assessment order u/s 143(3) was passed by making addition of Rs. 52,68,862/- (majorly on account of Bogus Long Term Capital Gain) on 26/12/2016 assessed total Income at 59,33,000/-, marked as Annexure-3(PB-37-39).

4. A Separate Appeal Proceedings has been initiated on 11/01/2017 before First Appellate authority and matter yet to be decided, copy of Form 35 is annexed as Annexure-4 (PB-80-82).

5. Later on, a show cause notice was issued on 15/02/2019 from Hon'ble PCIT under section 263 of the Act, alleging that the assessment order passed u/s 143(3) of the Act, on dated 26/12/2016 was erroneous and prejudicial to the interest of the revenue and requiring explanation for the same, marked as Annexure-5(PB-83-84),

6. Reply against the said notice was furnished by the assessee appellant on 11/03/2019, marked as Annexure-6 (PB-85-87),

7. Thereafter by rejecting the reply case was reviewed u/s 263 by the Hon'ble Pr.CIT-2 on 18/03/2019 marked as Annexure-7 (PB-88-93).

8. The Order of Hon'ble Pr. CIT dated 18/03/2019 was challenged by the Assesse appellant before Hon 'ble ITAT through which direction passed for AO to verify the explanation of the Assesse and decide the issues, copy of such order is being attached and marked as Annexure-8 (PB-94-103),

9. By following the direction of Hon'ble Pr. CIT case was re-opened and re-assessed by the Ld. AO by making the addition on account of Cash Payment in Purchase of Real Estate for Rs. 836000/- u/s 40A(3) of the Act,

10. Subsequently, assessment order u/s 143(3)/254/143(3) of the Income Tax Act, 1961, was passed on 30.11.2019 alleging that the cash paid in purchase of land was in contravention of the sec 40A(3) of the Act, with addition of Rs. 8,36,000/-(Rs.6,82,000/- + Rs. 1,54,000/-) in the total income of the assessee as assessed on dated 26/12/2016, therefore total taxable income has been scratched at Rs. 67,69,000/- which is under challenged and submitted along with Form 35 before Your Honour.

Brief facts about the Questioned Transaction:

11. During the year under consideration, the assessee was involved in the business of Real Estate including sale/construction of flats/units and sale of plots.

12. During the year she got entered into execution of Registration of Documents of Two Property which belonged to Stock in Trade therefore considered as Goods in term of Business Transaction, such purchases have been declared and presented in Profit and Loss account of the assessee, already placed at Annexure-1 (PB-32).

13. Out of two Properties one (Plot No. A-123, SitaramVihar Gram Ramsinghpura, Tehsil Sanganer, District Jaipur) was purchased on 31/12/2013 through Registered documents, Copy of same is Annexed as Annexure-9 (PB-104-114)

By observing this Purchase documents it is revealed that on 31/12/2013 the Purchase Document was Registered only. Because actual transaction was taken place on 28/09/2012, that time whole Transaction in view of Section 53A of Transfer of Property Act (Part Performance) had been completed viz. Possession had been transferred to the assessee appellant and simultaneously assessee appellant had made complete payment of Rs. 6,82,000/- in cash to the seller on very same date i.e. 28/09/2012. Relevant para at Page no. 2 of Registered sale deed (document) is being re produced ;

“ यह की मुझे अपनी निजी व पारिवारिक आवश्यकताओं की पूर्ति के लिए रुपयों की आवश्यकता होने के कारण मैंने उक्त भूखंड को निष्पादित इकरारनामा दिनांकित 28 सितम्बर 2012 से कुल 6,82,000/- (छः लाख बयासी हजार) रुपये मात्र के प्रतिफल स्वरूप क्रेत्री के हक में कतई विक्रय करके उक्त भूखंड का वास्तविक स्वरूप से भौतिक कब्जा दिनांक 28/09/2012 को ही क्रेत्री को सौंप दिया था तथा क्रेत्री ने उक्त भूखंड के विक्रय प्रतिफल की सम्पूर्ण राशी 6,82,000/- (छः लाख बयासी हजार) रुपये मात्र दिनांक 28/09/2012 को ही इकरारनामा निष्पादित करते समय नगदस्वरूप मुझे भुगतान कर दी थी, जिस राशी को मैं इस विक्रय पत्र में प्राप्त करना स्वीकार करता हूँ | इस प्रकार मुझे उक्त भूखंड के सम्पूर्ण विक्रय प्रतिफल की राशी प्राप्त हो चुकी है | भविष्य में क्रेत्री अथवा उसके अधीन क्लेम करने वाले किसी भी व्यक्ति द्वारा किसी भी प्रकार की कोई राशी मुझे अथवा मेरे अधीन क्लेम करने वाले किसी भी व्यक्ति को विक्रय प्रतिफल या अन्य किसी भी रूप में अदा करना बकाया नहीं रही है | क्रेत्री द्वारा निजिकारणवश उक्त भूखंड को विक्रय पत्र का पंजीयन उसी समय नहीं करवाया जा सकने के कारण क्रेत्री के द्वारा निवेदन करने पर मैं यह विक्रय पत्र क्रेत्री के हक में आज निशुद्ध कर रहा हूँ |”

By perusal of aforementioned declaration from seller party of that property it is revealed that the actual transaction was took place in FY 2012-13 pertains to the AY 2013-14 and complete purchase consideration was paid on 28/09/2012 in cash i.e. 6,82,000/-. This facts can be verified with the relevant Purchase deed and relevant para as mentioned at Page No.2 of such deed, it is also observed from such deed that this facts is mentioned not only single place of such deed rather at various places this declaration has been reiterated therefore but Ld. AO did not appreciate this fact .

We are reproducing the relevant provision of Section 40A(3) of the Act, "Expenses or payments not deductible in certain circumstances. 40A(3)⁹⁸ Where the assessee incurs any expenditure⁹⁹ 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, ¹[or ⁹⁹use of electronic clearing system through a bank account ²[or through such other electronic mode as may be prescribed³], exceeds ten thousand rupees,] no deduction shall be allowed in respect of such ⁹⁹expenditure."

Here it is cleared that assessee made the payment of Rs. 6,82,000/- on 28/09/2012 which comes under AY 2013-14 while Ld. AO made disallowance of such expenditure in AY 2014-15 by treating it as payment made on 31/12/2013 (the date of registered documents) here it is made clear that assessee had to make the payment on 28/09/2012 in cash and the document got registered in her name on 31/12/2013 therefore incurrance of expenditure and making payment such person both fall under different Financial year henceforth the mandatory condition for invoking section 40A(3) of the Income Tax Act, does not fulfil led to wrong invocation thereby disallowance of Rs. 6,82,000/- should be deleted.

14. Similarly, another property (plot no. 158, Narayan Vihar –T, Village Shringarpura, Tehsil Sanganer, Jaipur), was purchased by the assessee and the Purchase document was registered on 02/09/2013 for a total amount of Rs. 14,75,000/- . The payment for the property was made by the assessee for Rs. 13,21,000/- through cheque vide no. 928988 of Oriental Bank of Commerce, Church road, Jaipur on 10.07.2012. The remaining amount of Rs. 1,54,000/- was paid in cash in two parts where Rs.140000/- was paid on 02.05.2013 as advance and Rs. 14000/- was paid on 02.09.2013 . A copy of registered document is attached and marked as Annexure 10(PB-115-127).

Both the Payments are being tabularized here below;

Date	Particulars	Consideration	Payment	Date	Remarks
13.12.2013	Plot. No. 123, SitaramViharVistar, Village Ramsinghpura, Tehsil Sanganer, Jaipur	682000	682000	28.09.2012	CASH as Advance
2.09.2013	Plot. No. 158, Narayan Vihar- T, Shringarpura, Jaipur	1475000/-	1321000/-	10.07.2012	Cheque
			140000/-	02.05.2013	Cash as Advance
			14000/-	02.09.2013	Cash

But ignoring the above stated facts the Id. AO made an addition of Rs. 8,36,000/- (6,82,000/-+1,40,000+14,000) on account of Cash Payment Under Section 40A(3) of the Act.

It is also appreciable that at the making the payment of such cash the assessee was having sufficient cash balance in his hands, and for this purpose he has submitted many evidences during the course of the assessment proceeding but the Ld.AO did not rebut those evidences rather ignored, copy of relevant part of Cash book for the year 2012-13 and 2013-14 are also being annexed as Annexure-11.

Here it should be noted that 'incurrence' and 'making payment of an expenditure' should be on same date and it should be with same person but instant case both the activities happens on different dates therefore main ingredient of section 40A(3) does not fulfil led to invocation is bade in law.

The Ld. AO has grossly erred in making addition under section 40A(3) of the act, as the questioned transaction of cash payment does not comes under the basic condition as mentioned under section 40A(3) of the act, for their invocation, therefore complete assessment proceedings should be declared void ab initio

Further it is also notable that the Ld. AO was proceeded the matter under question on the direction of Honorable ITAT vide their order dated 04/09/2019, through which it was directed to Ld. AO to verify the explanation of the assessee and then decide the issue of disallowance under section 40A(3) of the act but while acting it is so the Ld. AO did not follow adequately the direction of the Honorable ITAT but to constraint himself only upon one area which was applicability of 44AD of the act, while during the proceeding the appellant raised so many issues before the then which includes 'looking to the facts of the case the applicability of section 40A(3)' and 'Reasonableness of the payments' which are core issues and goes to the root of the matter, Honorable CBDT has also issued various circulars for giving relax to the assessee after verifying such issues, certainly this ignorance of Ld. AO raises the question of following the Principle of natural justice and need to quash the proceedings on the basis of this ground alone.

Ground No.-1

Without Jurisdiction:

(I) During the course of Regular Assessment the Ld.AO had applied his mind on questioned transaction;

The case originally selected under complete scrutiny category as communicated to the assessee by the Ld. AO henceforth all the transaction as was being done during the year under consideration has been examined fully by the Ld.AO and had applied their mind on all the transaction and after having satisfaction regarding each and every corner of the transaction, Ld. AO passed the order, therefore, It is

humble submission that the order as passed by the Ld. AO was not 'erroneous' and not construed 'Prejudicial to the interest of the revenue'.

Similarly, the Ld. AO had enquired specifically by the notice as issued u/s 142(1) dated 04.08.2016 by point no. 17 as follows;

"Please provide details of method of valuation of stock. Whether day to day stock register is maintained? If yes, whether manual or computerized? If stock details are not maintained, please state in what manner stock records are maintained and whether they are verifiable, vis-à-vis purchase/consumption/sales? Also provide inventory of opening and closing stock along with its valuation."

Copy of the letter is being Annexed as Annexure-2 (PB-34-36).

In consonance with the said question the assessee submitted their submission with the copies of registered sales/purchase deed with complete books of accounts and other documents which were examined by the Ld. AO and after getting satisfied, admitted it, therefore, on account of aforesaid query as raised by the Ld. AO the then, the order cannot have been erroneous and prejudicial to the interest of revenue.

As per the facts and circumstance of the case, the assessment proceedings reopened by the Ld. PCIT, Jaipur, is erroneous and not justified in the eyes of the law. The invocation of Section 263 of Income Tax Act, 1961 is bad in law by which the Ld. AO made such a huge addition, due to barred by jurisdiction on various grounds included as during original assessment proceedings the Ld. AO has applied their mind on questioned transaction which was sole basis for re-opening by the Ld. PCIT, Jaipur, therefore complete assessment proceedings should be declared void ab initio.

It is also notable that during the course of assessment proceeding the Ld. AO the then made certain additions in the total Income of the assessee by making an Addition of Rs. 52,68,862/- therefore total Income had been scratched up to Rs. 59,33,000/-.

Later on, the Hon'ble PCIT was erred in law and facts in exercising the jurisdiction u/s 263 by setting aside the assessment done by the Ld. AO Which has been discussed and scrutinized in detail while framing the assessment u/s 143(3).

Assumption of power u/s 263 by the Ld. PCIT by holding the assessment u/s 143(3) as erroneous and prejudicial to the interest of the revenue is not justified as the Ld. PCIT made no enquiry or examination of the given facts. Such invocation is not valid and proper as there was no minimal enquiry made by the Ld. PCIT to support his findings that the assessment made by AO is prejudicial to the interest of the revenue. On the other hand the Ld. AO had applied his full mind and enquired about all the information and details provided by the assessee in the matter

concerned above regarding the purchase of two properties viz. of Rs. 14,75,000/- and Rs. 6,82,000 in the A.Y. 2014-15.

Here it is humble submission before your honor that for invoking section 263 of IT Act, it is mandatory for the order of AO sought to be revised is erroneous and it is prejudicial to the interest of the Revenue, if one of them is absent- if the order is erroneous but is non-prejudicial to the revenue-recourse cannot be had to section 263(1).

The Honorable Apex Court propounded in a land mark judgment of Malabar Industrial Co. Ltd. Vs. CIT(2000) reported on 109 Taxman 66/243 ITR 83 (SC) has held;

A bare reading of provisions of S. 263 makes it clear that the prerequisite to exercise of jurisdiction by the CIT suo motu under it, is that the order of the ITO is erroneous in so far as it is prejudicial to the interest of the Revenue. The CIT has to be satisfied of twin conditions namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the Revenue. If one of them is absent-if the order of the ITO is erroneous but is non-prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to S. 263(1). There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the; principles of natural justice or without application of kind. The phrase prejudicial to the interest of the Revenue is not an expression of art and is not confine to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Ito, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of the Revenue. The Phrase prejudicial to the interest of the Revenue has to read in conjunction with an erroneous order passed by the AO., Every loss of revenue as consequence of an order of AO cannot be treated as prejudicial to the interest of the Revenue, example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue unless the view taken by the ITO is unsustainable in law.”

By taking the aforementioned view, DB of honorable ITAT Bench, Amritsar held that order passed by AO was not erroneous and prejudicial to the interest of revenue in the matter of Sartaj Singh vs. Pr.CIT, Bathinda as reported on 88 Taxman. Com 353 where section 263 had invoked by the Honorable Pr. CIT for examination of violation of provision of section 40 A (3) of the act,

(II) Two parallel proceedings can not be go on;

It is also face on record that at the time of issuing show cause notice by Hon'ble Pr. CIT dated 15/02/2019, an Appeal before CIT(A) was pending before Hon'ble CIT(A) the than (still it is pending), it is also settled legal position that Hon'ble CIT(A) quite empowered to enhance the assessment if he deem fit of it, therefore issue as was being raised by the Hon'ble Pr.CIT through such SCN dated 15/02/2019 it could have been referred to Hon'ble CIT(A) also rather to open a separate enquiry henceforth it should be treated glaring violation of judicial discipline and be declared complete proceeding null and void and delete the addition as made through order of Ld. AO dated 30/11/2019.

Therefore on the aforementioned factual circumstances and in view of honorable Apex Court we request may kindly declare complete proceedings as initiated u/s 263 of act, as illegal, invalid and void ab initio.

Ground No.-3;

Payment made according to circular as issued by CBDT [220 {F. No. 206/17/76-IT (A-II)}]; Under the facts and circumstances of the case the Ld. AO was not justified in making the addition of Rs. 8,36,000/- on account of disallowance under section 40(A)(3) without appreciating the fact that the purchase made by the assessee through registered deeds and payment made to an identified seller.

The Ld. PCIT ignored the fact that the identity of the person, from whom the said purchase was made, was clearly established and the purchase of said properties were made through the registered deeds. The fact that the identity of the person was identifiable and not fictitious, will automatically exonerate the assessee.

The object of the introduction of this sub-section was explained in a circular of the Board vide Circular No. 6P, dated 6th July, 1968 as follows;

“76 sub-section (3) of new section 40A makes a provision for the disallowance of expenditure incurred in business and profession for which payment is made in an amount exceeding Rs. 2,500/- otherwise than by a crossed cheque drawn on a bank or a crossed bank draft. This provision will apply in respect of payments made after a date to be notified by the Government, being a date not later than 31st March 1969. 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 the reasonableness of the payment.”

Thereby in given case both the payments have been made to an identified person who belong the property from whom the assessee made purchased through registered purchase deed got executed before sub registrar who was RAS cadre officer therefore purpose for making any investigation against such person may not be defeated hence such transaction should not be objectionable in the eye of law.

Ground No.-4;

Under the facts and circumstances of the case the Id. AO was not justified in making the addition of Rs. 8,36,000/- on account of disallowance under section 40A(3) without appreciating the facts that the payments comes under the exception as specified under rule 6DD of Income Tax Rule,

Genuineness of the transactions because Property transaction trails remains

That the plots were purchased through registered sale deeds, identity of the sellers and genuineness of the transactions are fully established and the Ld. PCIT & the Ld. AO have not raised any doubt over the genuineness of the payments and it is submitted that where the genuineness of the payments which are as per the registered sale deeds are not doubted by the Id. PCIT & the Ld. AO, no disallowance u/s 40A(3) could be made.

In order to secure the deal, assessee had no other option but to make the payment in cash. Cash payments were made from the disclosed sources being the amount withdrawn from bank. Had the assessee denied the cash payment looking to the provisions of sections 40A(3), the deal could not have been finalized. In such circumstances, in the business interest and to complete the deal, the assessee had chosen to make the payments in cash fortified through registered sale deed. The payment has been made out of the explained sources, through the registered document and as a disclosed transaction.

In support, reliance was placed on the decision of ITAT, Jaipur in M/s A Daga Royal Arts, Jaipur Vs ITO, Jaipur [ITA No. 1065/JP/2016] wherein it was held that:

"In the entirety of facts and circumstances of the case and respectfully following the legal proposition laid down by the various Courts and Coordinate Benches referred supra, we are of the view that the identity of the persons from whom the various plots of land have been purchased and source of cash payments as withdrawals from the assessee's bank account has been established. The genuineness of the transaction has been established as evidenced by the registered sale deeds and lastly, the test of business expediency has been met in the

instant case. Further, as held by the Hon'ble Rajasthan High Court in case of Harshila Chordia (supra), the consequences, which were to befall on account of non-observation of sub-section (3) of section 40A must have nexus to the failure of such object. Therefore, the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration. The intent and the purpose for section 40(3) has been brought on the statute books has been clearly satisfied in the instant case. Therefore, being a case of genuine business transaction, no disallowance is called for by invoking the provisions of section 40(3) of the Act."

In case of Gurdas Garg vs. CIT(A), Bathinda (supra), the matter which came up for consideration before the Hon'ble Punjab & Haryana High Court, the facts of the case are *pari materia* to the instant case and the ratio of the said decision clearly applies in the instant case. In that case, the facts of the case were that the assessee was engaged in trading in properties and during the course of assessment proceedings, the AO observed that there are transactions where the payments have been made in excess of Rs. 20,000/- in cash which were disallowed u/s 40A(3) of the Act. The Hon'ble High Court held that rule 6DD(i) is not exhaustive of the circumstances in which the proviso to section 40A(3) is applicable and it only illustrative. The Hon'ble High Court refers to the decision of the Hon'ble Rajasthan High Court in case of Smt. Harshila Chordia v. ITO (Supra) and the decision of Hon'ble Supreme Court in case of Attar Singh Gurmukh Singh v. ITO (Supra). The High Court further observed that the Id. CIT(A) has given a finding that the identity of the payee i.e. vendors in respect of land purchase by the appellant was established, the sale deeds were produced, the genuineness thereof was accepted and the amount paid in respect of each of these agreement was satisfied before the Stamp Registration Authority and the transactions were held to be genuine and the bar against the grant of deductions u/s 40A(3) of the Act was not attracted. The Hon'ble High Court further observed that the Tribunal did not upset these findings including as to the genuineness and the correctness of the transactions and it is also important to note that the Tribunal noted the contention on behalf of the appellant that there was a boom in the real estate market and therefore it was necessary, therefore, to conclude the transactions at the earliest and not to postpone them; that the appellant did not know the vendors and obviously therefore, insisted for payment in cash and that as a result thereof, payments had to be made immediately to settle the deals. The Tribunal did not doubt this case. The Tribunal, however, held that the claim for deduction was not sustainable. In view of Section 40A(3) as the payments which were over Rs. 20,000/- were made in cash. The Hon'ble High Court accordingly observed that "the Tribunal has not disbelieved the transactions or the genuineness thereof nor has it disbelieved the fact that payments having been made. More importantly, the reasons furnished by the appellant for having made the cash payments, which we have already adverted to, have not been

disbelieved. In our view, assuming these reasons to be correct, they clearly make out a case of business expediency."

Grounds No.5;

The impugned order u/s 143(3) dated 04.12.2019 is bad in law for that profit calculated under section 44AD not filled in ITR Form – 4 in column 34(i). Marley not filing the same column in the ITR Form not constitute any contravention of any provision of law and also not constitute basis of disallowance of expenses claimed under section 40A(3).

That having regard to the facts and circumstances of the case, the Ld. AO erred in invoking the provision of Section 40A(3) in reference to cash payment of purchase without considering that Assessee is covered in section 44AD of the I.T. Act for the year even though the assessee has maintained the books of accounts and records and produced the same. The Id A.O. during proceeding u/s 143(3) had examined the same and after detailed enquiries, he passed order. The Ld. A.O. might have considered the cash payment because of the assessee covered in section 44AD of the IT Act.

Assessee is engaged in the business of real estate and sell/constructions of flats/unit and plots. Her turnover for the AY - 2014-15 was Rs. 85.00 Lakhs and she declared profit of Rs. 7.64 Lakh which is 8.99% of her turnover.

Sub section (1) to the Section 44AD provides that " Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

Section 44AD is starts with non-obstante Clause " Notwithstanding anything to the contrary contained in sections 28 to 43C....., it is mandatory in nature if the assessee is eligible and declare the net profit equal to 8% of total turnover or higher.

Section 44AD is overriding provision and if assessee don't declare minimum net income i.e. 8% of his turnover he has to maintain books of accounts and get his accounts to be audited u/s 44AB of the Act, compulsory.

If any assessee covered u/s 44AD, provision of section 40A (3) is not applicable, it bypasses all the provisions contained in section 28 to 43C.

Section 44AD define the meaning of eligible assessee and eligible business. As per explanation given in section: -

(a) "eligible assessee" means, —

(i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and

(ii) who has not claimed deduction under any of the sections

10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C. - Deductions in respect of certain incomes" in the relevant assessment year;

(b) "eligible business" means,—

(i) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and

(ii) whose total turnover or gross receipts in the previous year does not exceed an amount of [one crore rupees]

Having regard to the facts, assessee is "eligible assessee" and had the "eligible business", she is covered on mandatory provisions of section 44AD of the Act and without prejudice to other ground of appeal, provision of section 40A(3) relating cash payment is not applicable to the assessee, therefore, Relief may please be granted by quashing the disallowance made by the Id. PCIT for cash payment Rs. 836000/- towards cash payment of purchase

Reliance is placed on the decision of Mohan Kumar Agarwal, Howrah vs Ito, Ward - 46(1), Kolkata [I.T.A. No. 1750/Kol/2018]

6. Under the fact and circumstances of the case to the Ld. AO was not justified in charging interest u/s 234B and 234C.

7. That the appellant reserved his right to add, amend, or alter the grounds of appeal on or before the date of appeal hearing,

In view of the above, it is requested to consider the appeal and grant appropriate relief to the appellant.”

9. To support the contention so raised in the written submission reliance was placed on the following evidence / records / decisions:

S. No.	Particular	Page No.
1.	ITR-V AY 2014-15 Dated 16/09/2014 along with ITR form and computation and revised ITR-V dated 22/07/2015.	1-33
2.	Copy of Notice calling information during Assessment proceeding u/s 143(3) dated 04/08/2016	34-36
3.	Copy of Assessment order passed dated 26/12/2016	37-79
4.	Copy of form 35 dated 11/01/2017	80-82
5.	SCN issued u/s 263 dated 15/02/2019	83-84
6.	Reply to SCN dated 11/03/2019	85-87
7.	Order passed u/s 263 dated 18/03/2019	88-93
8.	Order of Hon'ble ITAT dated 04/09/2019	94-103
9.	Copy of Registered Purchased deed dated 31/12/2013	104-114
10.	Copy of Registered Purchased deed dated 02/09/2013	115-127
11.	Copy of SCN dated 08/11/2019	128-129
12.	Copy of Reply during proceeding u/s 263 dated 25/11/2019	130-143

- **Case laws relied upon:**

S. No.	Particular	Page No.
1.	Smt. Harshila Chordia v. Income-tax Officer D.B. INCOME-TAX APPEAL NO. 4 OF 2002 NOVEMBER 7, 2006	1-5
2.	A. Daga Royal Arts v. Income-tax Officer IT APPEAL NO. 1065 (JP.) OF 2016 Dated MAY 15, 2018	6-24
3.	M/s K.K. Construction Co. V/s The ACIT ITA. No. 990/JP/2017 Dated : 05/12/2019	25-53

10. The Id. AR of the assessee in addition to the above written submission so filed vehemently argued that the assessee has not made any payment in the year under consideration, if any payment is to be disallowed, it should be disallowed in the year of payment. The assessee supported the payment details by placing on record the cash book. The fact of the case has not been disputed by the Assessing Officer or that of Id. CIT(A). The payment is duly recorded in the deed of purchase made by the assessee and therefore since the identity of the parties are already disclosed and available considering the background under which the provisions of section 40A(3) of the Act, disallowance cannot be made in the hands of the assessee. The Id. AR of the assessee so far as the payment of Rs. 6,82,000/- made by the assessee being made on holiday where banking facilities were not available and therefore, the appellant is covered by the provisions of rule 6DD(j) of the IT Rules and therefore, this disallowance cannot be made even on the merits of the case. So far as the payment of Rs. 1,40,000/- and 14,000/- comprise of Rs. 1,54,000/-. The Id. AR of the assessee relied upon the binding precedent in the case of Rajasthan High Court Smt. Harshila Chordia v. ITO in D.B. Income-tax No. 4 of 2002 November 7, 2006.

Based on these arguments, Id. AR of the assessee summarily submitted that considering CBDT instructions No. 6P dated 6th July, 1968 , rules 6DD(j) and decisions relied upon the addition made is required to be deleted.

11. Per contra, the Id. DR relied upon the orders of AO and that of Id. CIT(A), the Id. AR of the assessee as regards contention of the year of payment categorically argued. Since the assessee has debited the amount in the year under consideration in the profit & loss account the provisions of section 40A applies in the year under consideration and the disallowance has correctly been sustained by Id. CIT(A).

12. We have heard the rival contentions and perused the material placed on record. The bench noted that ground no 2, 3, & 4 raised by the assessee deals with the disallowance of Rs. 8,36,000/- made in the hands of the assessee. The brief facts related to the issue are that the assessee has acquired the following two properties.

S.No.	Date of purchase	Particulars	Purchases cost	Mode of payment	Amount paid	Date of payment	Nature of payment
1	13.12.2013	123, Sita Ram Vihar	719203.00	Cash	682000.00	28.9.12	Purchase Consideration
				Cash	37203.00	31.12.13	Registry Exp
2	02.09.13	T-158 Narayan Vihar	1532850.00	Cheque	1321000.00	10.7.12	Purchase Consideration
				Cash	140000.00	2.5.12	Purchase Consideration
				Cash	14000.00	2.9.13	Purchase Consideration
				Cash	57850.00	2.9.13	Registry Exp
		Total	2252053.00		2252053.00		

As is evident from the above table that during the year under consideration, the assessee purchased the plot No.123, Sita Ram Vihar Vistar, Village-Ramsinghpura Urf Rampura, Tehsil Sanganer, Jaipur from Shri Kalyanmal Agarwal S/o Laxmi Narayan Agarwal, Vikas Kunj, Vikas Marg, Mansingpura, Tonk Road, Jaipur for cost of acquisition of Rs.6,82,000/- in cash through sale deed dated 31.12.2013 which was executed by Sub-Registrar-I, Jaipur valued the above property at Rs.6,83,148/-. The assessee also purchased the plot No.158, Naryan Vihar-T, Village-Shrigarpura, Tehsil-Sanganer, Jaipur from Shri Rishi Kumar Agarwal S/o Jai Prakash Agarwal, Maator Road, Petrol Pump, Kherthal, Alwar for cost of acquisition of Rs.14,75,000/- in cash through sale deed dated 02.09.2013 which was executed by Sub-Registrar-VII, Jaipur valued the above property at Rs.14,75,000/- in which payment of Rs.13,21,000/- was paid through cheque No.928988 of Oriental

Bank of Commerce, Church Road, Jaipur and remaining amount of Rs.1,54,000/- was paid in cash. As is evident that the assessee made the payment of Rs.6,82,000/- and Rs.1,54,000/- in cash in purchasing of above immovable properties in contravention to the provisions of section 40A(3) of the Income Tax Act, 1961 no deduction shall be allowed in respect of such expenditure for an amount of Rs. 8,30,000/- which were paid in cash. Hence, the same were not considered as allowable and accordingly the same was added as income of the assessee.

The bench noted that so far as the payment of Rs. 6,82,000/- date of payment is duly recorded in the sale deed i.e. 28.09.2012 and the rest of the two payments were made on 02.05.2012 for an amount of Rs. 1,40,000/- and on 02.09.2013 Rs. 14,000/-. Rs. 14,000/- being made below Rs. 20,000/- is not covered u/s. 40A(3) of the Act. The Id. AR of the assessee in support of the contention that submitted that where genuineness of transaction and identity of payee were established and explanation of assessee for making cash remittances was acceptable in the light of modus operandi of assessee's business, payments in cash could not be disallowed. To drive home to this contention Id. AR of the assessee relied upon the judicial precedent of our own Hon'ble Rajasthan High Court in

the case of Smt. Harshila Chordia v. Income-tax Officer [298 ITR 349 (Rajasthan)] wherein the court has observed that ;

In our opinion, perusing the provisions of section 40A(3) along with rule 6DD and the explanatory note contained in the circular issued by the Central Board of Direct Taxes, which binds all the authorities under the Act, shows that the Tribunal has erroneously assumed that enumeration of instances in the circular in which the provisions of clause (j) under rule 6DD would operate to be exhaustive of such circumstances and had not properly understood, its implication.

It may be pertinent to notice that primary object of enacting section 40A(3) in its original incarnation 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. The consequence which was provided was to disallow of deduction of such payments/expenses which were not through bank either by crossed cheques or by demand draft or by pay order.

This provision has been subsequently amended. 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 sub-section (3) of section 40A must have nexus to the failure of such object. Therefore, the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration which has been overlooked by the Tribunal.

In this connection, the judgment of the hon'ble Supreme Court which needs to be noticed is in the case of *CTO v. Swastik Roadways* reported in [2004] 2 RC 539 ; [2004] 3 SCC 640. The consequence of non-compliance with certain provisions of the Madhya Pradesh Sales Tax Act, which were intended to check the evasion and avoidance of sales tax were significantly harsh. The court while upholding its 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 under section 57(2).

Of course, present is not a case of 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* [2004] 2 RC 539 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 circular of the Central Board of Direct Taxes 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.

This is particularly so, because the consequence provided under section 40A(3) for failure to make payments through bank is not absolute in terms nor automatic but exceptions have been provided and leverage has been left for little flexing by making a general provision in the form of clause (j) in rule 6DD.

"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".

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 where 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 purchased the goods ; or
f. specific discount is given by the seller for payment to be made by way of cash.

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

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.

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)."

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.

This clarification, in our opinion, is in conformity with the principle enunciated by the Supreme Court in *CTO v. Swastik Roadways* reported in [2004] 2 RC 539 ; [2004] 3 SCC 640 as noticed above.

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.

Moreover, the list of circumstances stated under paragraph 4 of the circular being not exhaustive, in terms of the Tribunal's own finding that the assessee was receiving payments in cash from his customers at Kankroli and was to get delivery of vehicles from Udaipur and she has opened a bank account to facilitate the quick transfer of money from bank to its dealer to satisfy the conditions of section 40A(3) and that she has left the signed cheque book also in possession of the dealer so that the cash is transmitted in the assessee's bank account and he could receive the payments through cheques, which are not disputed, it is apparent that the assessee has done all which she was required to do and it is not the finding of the Tribunal that the assessee was purchasing the vehicles from Udaipur and carrying them to Kankroli for the purposes of delivering them to her buyers. On the contrary, the modus operandi of the assessee was accepted by the Tribunal while considering the

question of the cash credit that deposit of each receipt of the cash money from its customers separately was not conducive to the type of the business which the assessee was running. Moreover, the assessee and the principal dealer had struck a way out by opening a bank account at Udaipur so that neither the payment to the principal dealer is delayed because of the bank middleman nor was the assessee required to deposit every receipt from his customers at Kankroli or to personally go to Udaipur to deposit in bank and then draw a cheque and send it to the principal dealer. The one significant factor which is not disputed and which is found to be correct that the assessee was to receive his supplies from the principal dealer who was situated at Udaipur and the dealing was from buyer to buyer. Therefore, making the prompt payments to dealer, the cash consideration received from the end purchaser and getting delivery of vehicles for such purchaser by payment of consideration received from him to the principal dealer was the *modus operandi*.

In these circumstances, we are of the opinion that the conclusion reached by the Commissioner of Income-tax (Appeals) was correct and the Tribunal by ignoring the scope of clause (j) of rule 6DD as explained by the Board's Circular has erred in reversing the finding reached by the Commissioner of Income-tax (Appeals) on hyper-technical view. We, therefore, allow this appeal and set aside the order of the Tribunal to the extent it sustains the additions of Rs. 40,13,000 under section 40A(3).

So far as question No. 2 is concerned, apparently when the Tribunal has found as a fact that the assessee was receiving money from the customers in hands against the payment on delivery of the vehicles on receipt from the dealer the question of such amount standing in the books of account of the assessee would not attract section 68 because the cash deposits becomes self-explanatory and such amounts were received by the assessee from the customers against which the delivery of the vehicle was made to the customers. The question of sustaining the addition of Rs. 6,98,000 would not arise.

We, therefore, hold that no addition was required to be made in respect of Rs. 6,98,000, which was found to be the cash receipts from the customers and against which delivery of vehicle was made to them.

Question No. 2 relates to the directions given by the Tribunal for adjustment of Rs. 6,98,000 found in paragraph 36 to be part of unexplained cash credits in the books of account of the assessee by the comparative reading of audited and unaudited books of account. However, we find that where a categorical finding has been reached in paragraph Nos. 36 and 23, the Tribunal has curiously found that while repayment of the aforesaid amount after December 31, 1991, would not affect the peak of cash credit but this amount is liable to be considered while considering the assessee's explanation by the Assessing Officer to whom the issue about the receipt of cash money from the customers and the delivery of the vehicles against such receipts has been remanded back. In our opinion, the two findings are contradictory in terms, if Rs. 6,98,000 could form the part of consideration received from the

customers and paid to the dealer M/s. Ganesh Automobiles, it could not form the part of the unexplained cash credit. Therefore, the finding in respect of Rs. 6,98,000 should necessarily depend upon the outcome of the consideration to be made by the Income-tax Officer in pursuance of the directions issued by the Tribunal and cannot be outrightly rejected at this stage and to that extent the order of the Tribunal is set aside and ultimate decision in that respect would depend on the consideration by the Income-tax Officer about the issue relating to the unexplained cash credit in the light of the Tribunal's order. Until then no additions in respect of Rs. 6,98,000 or lesser amount can be sustained.

Accordingly, while we set aside the Tribunal's order to the extent it sustains the addition of Rs. 40,13,000, we modify the directions of the Tribunal relating to addition Rs. 6,98,000 as part of the cash credit and hold that it should also be part of consideration by the Income-tax Officer in respect of other unexplained cash credits unembellished by any observation made in that regard.

No costs.

As we note that the facts of the case on hand and that of the case law relied upon by the assessee having binding precedent we direct the Id. AO to delete the disallowance of Rs. 8,36,000/- made in the case of the assessee. Based on these observation ground no. 2,3 & 4 stands allowed. Ground no. 1 & 5 being technical ground and since we have decided the appeal on the merits we do not considered it to decide the technical grounds raised. Ground no. 6 being consequential in nature does not require our adjudication and ground no. 7 being general does not require any finding.

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

Order pronounced in the open Court on 19/12/2024.

Sd/-

Sd/-

(सुधीर पारीक)
(SUDHIR PAREEK)
न्यायिक सदस्य / Judicial Member

(राठौड़ कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 19/12/2024

*Ganesh Kumar, Sr.PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Surbhi Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 6(4), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 1046/JPR/2024 }

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar