

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA
BEFORE SHRI A.T.VARKEY, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.681/KoI/2014

(निर्धारण वर्ष /Assessment Year:2009-2010)

Birendra Nath Mondal, Prop.Damra C.S.Shop & Mani Kamal Hotel, 2, Hospital Road, Asansol-713304	Vs.	ITO, Ward-2(2), Asansol G.T.Road, Parmar Building, Asansol-713304
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: AMAPM 5196 M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by : Shri U.Dasgupta, Advocate
Revenue by : Shri Rajat Kumar Kureel, JCIT

सुनवाई की तारीख / **Date of Hearing** : **21/02/2017**

घोषणा की तारीख/**Date of Pronouncement** **23/02/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Assessee pertaining to the Assessment Year 2009-2010, is directed against the order passed by Id. CIT(A), Asansol in Appeal No.226/CIT(A)/Asl/w-2(2)/Asl/11-12, dated 25.11.2013, which in turn arises out of an order passed by the Assessing Officer (AO) Under Section 143(3) of the Income Tax Act 1961, (hereinafter referred to as the 'Act'), dated 08.12.2011.

2. Brief facts of the case qua the assessee are that the assessee filed its return of income on 29.03.2010. Later on, the assessee's case was selected for scrutiny u/s.143(3) of the Act and the AO has completed the assessment by making addition u/s.40A(3) at Rs.58,57,326/- and other additions. While making the addition u/s.40A(3) the AO observed that the assessee has made payment towards purchase in cash on different dates by violation of provisions u/s.40A(3) of the Act, 1961. The assessee purchased country spirit from Asansol Bottling and Packaging Pvt. Ltd.

and paid directly into the bank account of the concerned company by depositing cash of Rs.48,79,201/- under a challan. The assessee also purchased C.Spirit and Coloured flavours from Mc Dowell of Asansol in cash for Rs.9,78,125/-. The AO observed that the assessee is habituated to deposit cash in the bank account by making violation of provisions of Section 40A(3) of the Act, therefore, total cash purchased amounting to Rs.58,57,326/- was added by the AO.

3. Aggrieved from the order of AO, the assessee filed an appeal before the Id. CIT(A), who has confirmed the order passed by the AO observing the followings :-

5. There was no response even to subsequent postings on 7.10.2013 and 20.11.2013. Hence the matter is adjudicated on the basis of evidence in record. The payment disallowed by Assessing Officer invoking section 40A(3) is not to Government. The case of appellant is not covered by any of the sub-clauses of rule 6DD. Rules 4 and 5 of West Bengal Excise (Supply of Country Spirit on payment of Duty) Rules, 2005 prescribe the manner of payment to West Bengal Govt. It states that bottling plant has to make advance payment to Govt. and sums paid by individual dealers are debited to the advance. There is no remittance of case by case remittance of sums paid by dealers to bottling plant for subsequent remittance by bottling plant to Govt. The rules nowhere prescribe mandatory cash payment. Accordingly I hold that the Assessing Officer has correctly made the disallowance. The questions raised by me with reasons are not negated. In its absence, for reasons stated in the proposal issued to appellant, I dismiss ground 1.

4. Not being satisfied with the order of Id. CIT(A), the assessee is in further appeal before us and has taken the following grounds of appeal :-

- 1) *For that the order of the Ld. CIT(A) is arbitrary, excessive, hence bad in law.*
- 2) *For that on the facts of the case the Ld. CIT(A) was not legally justified in sustaining the addition of Rs. 5857326/-, u/s 40A(3) of the Act'61, when the said payments even though, made otherwise than by A/c payee cheques and A/c Payee Bank Drafts, are covered by the exception prescribed under Rule*

6DD of the IT.Rules, 62, and as such the addition may please be deleted.

- 3) *For that on the facts of the case the Ld. CIT(A) was not legally justified in sustaining the addition of Rs.38,000/- on A/c of salary, the addition may please be deleted.*
- 4) *For that on the facts of the case the Ld. CIT(A) was not legally justified in sustaining the addition of Rs.2,52,879/- on Alc of Bank Charges ,and the addition may please be deleted.*
- 5) *For that the appellant craves leave to add, alter, amend any further grounds of appeal before or at the time of hearing.*

5. Although in this appeal the assessee has raised five grounds of appeal but at the time of hearing, the main grievance of the assessee has been confined to ground No.2 and ground No.4. Ground No. 3 is not pressed by the assessee.

6. Ground No.2 relates to addition of Rs.58,57,326/- u/s.40A(3) of the Act on account of payment made, otherwise than by A/c payee cheques and A/c Payee Bank Drafts.

6.1 Ld. AR for the assessee has submitted before us that the issue under consideration is fully covered by the two judgments of the Kolkata Bench of the Tribunal. Ld. AR for the assessee submitted before us that the assessee is a retailer of country spirit and paid directly into the bank account of concerned Bottling Plant Co. by depositing cash which is approved by West Bengal Govt. and it is covered by the exception prescribed under Rule 6DD of the IT Rules 1962. In addition to this, Id. AR for the assessee has relied on the following judgments :-

- i) M/sTopsi Kenda C.S.Shop, ITA No.419/Kol/2014, order dated 13.01.2017:

4. We have heard both the parties and perused the records. We take note that the assessee is a retail vendor of country spirit, other than that there is no mention about how the business activity is

conducted or how the assessee makes the payment etc. is deciphered from the orders of the authorities below. The Ld. AR has submitted before us that the assessee is a retail vendor of country spirit and the assessee i.e. the retail vendor had made cash payments for purchase of country spirit by depositing cash directly in the bank account of M/s Asansol Bottling & Packaging Co. Pvt. Ltd. (M/s ABPL) which is the bottling firm and is the warehouse within the meaning of Rule 2(vii) of the West Bengal Excise (Supply of Country Spirit on Payment of Duty) Rules 2005 (hereinafter referred to as the "Rules"). It was explained before us by the Ld. AR that the payment of cash is made by the assessee (retail vendor) by depositing cash directly in the bank account of M/s M/s ABPL as per Rule 6(2) of the Rules. In case if the assessee (retail vendor) is making cash payment for purchase of country spirit directly into ITA No.419/Kol/2014 M/s. Topsi Kenda C.S. Shop A.Yr.2008-09 the bank account of M/s ABPL as per Rule 6(2) of the Excise Rules, 2005 then the Tribunal order in ITA No. 148/Kol/2015 and 185 & 186/Kol/ A.Y. 2007-08 & 2010- 11 respectively will come in aid of the assessee because in these cases it has been held by the Tribunal that if such payment has been made as per Rule 6(2) to the bank account of M/s ABPL which is a warehouse within the meaning of Rule 2(vii) of the West Bengal Excise Rules 2005, and so is a State Government establishment which is controlled by the Excise Commissioner and resultantly the payment made in cash to it will attract the exemption provided in Rule 6DD(b) of the Income Tax Rules, 1962.

ii) Bolkunda Pachwati & (S) C.S.Shop, ITA Nos.165&166/Kol/2014, order dated 10.08.2016:

3.9. The Id AR had advanced another argument that the payment is made by the assessee to State Bank of India and accordingly the same would fall under the exception provided in Rule 6DD(a) of the Rules. We find that the assessee had made payments only to the customer of State Bank of India and not to State Bank of India. Hence the assessee's case does not fall under the exception provided in Rule 6DD(a) of the Rules.

3.10. We hold from the aforesaid findings that the assessee's case falls under the exceptions provided in Rule 6DD(b) and Rule 6DD(k) of the Rules. In view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we have no hesitation in deleting the disallowance made u/s 40A(3)"

6.2 On the other hand, Ld. DR for the Revenue has primarily relied on the findings of the AO which we have already noted in our earlier para and is not being repeated for the sake of brevity.

6.3. Having heard the rival submissions, perused the material on record, we are of the view that there is merit in the submissions of the assessee, as the proposition canvassed by Id. AR for the assessee are supported by the facts narrated by him above and the case laws cited by him above. As Ld. AR for the assessee has pointed out that the assessee's case is covered under Rule 6DD of the Rules, 1962. In view of the above facts and circumstances of the case and respectfully following the judicial precedents of the Kolkata Bench of the Tribunal, we have no hesitation in deleting the disallowance made u/s.40A(3) of the Act. Accordingly, we delete the addition.

6.4 In the result, appeal filed by the assessee on ground No.2 is allowed.

7. Ground No.4 relates to addition of Rs.2,52,879/- on A/c of Bank Charges.

7.1 Ld. AR for the assessee has submitted that the assessee did not file bank statement before the AO to explain the bank charges, because these bank statements were not available before the assessee. The assessee also did not file bank statement before the Id. CIT(A), therefore, the Id. AR for the assessee requested the bench to send the case back to the file of AO to examine the bank charges and adjudicate the issue.

7.2 On the other hand, Id. DR for the revenue has relied on the orders passed by the AO.

7.3 Having heard the rival submissions, perused the material on record, we are of the view that there is merit in the submissions of the assessee, as the proposition canvassed by Id. AR for the assessee are supported by

the facts narrated by him above. As Ld. AR for the assessee has pointed out that because of certain circumstances the assessee could not produce the bank statement before the AO and before the Id. CIT(A), therefore, they have made said addition. Now, the assessee is ready to furnish the bank statement and to explain the bank charges, therefore, we are of the view that this bank statement is to be examined by the AO and, thus, we remand the case back to the file of AO to adjudicate this issue after examination of the bank statement. If the AO finds the bank charges in the bank statement at Rs.2,52,879/-, then he should give relief to the assessee. Accordingly, this ground is allowed for statistical purposes.

7.4 In the result, the appeal filed by the assessee on ground No.4, is allowed for statistical purposes.

Order pronounced in the open court on this 23/02/2017.

Sd/-
(A.T.VARKEY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 23/02/2017

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-Birendra Nath Mondal
2. प्रत्यर्थी / The Respondent.- ITO, Ward-2(2), Kolkata
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
(Asstt. Registrar)

आयकर अपीलीय अधिकरण, कोलकाता / ITAT, कोलकाता