

**IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA
BEFORE SHRI S.S.VISWANETHRA RAVI, JM & DR. A.L.SAINI, AM**

आयकर अपील सं./ITA No.460/KoI/2015

(निर्धारण वर्ष /Assessment Year:2010-2011)

ITO Ward-2(3), Durgapur, Aaykar Bahwan Annexe, City Centre,Durgapur-16	Vs.	Amzad Ali Khan, Mayabazar C.S.Shop, Durgapur, Burdwan- 713207
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AETPK 7846 K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by : Shri Pinaki Mukherjee, JCIT
Assessee by : Shri Somnath Ghosh, Advocate
सुनवाई की तारीख / **Date of Hearing** : **10/11/2016**
घोषणा की तारीख/**Date of Pronouncement** **25/11/2016**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, pertaining to the Assessment Year 2010-2011, is directed against an order passed by Id. Commissioner of Income Tax (Appeals), Durgapur in Appeal No.322/CIT(A)/DGP/2013-14, dated 30.01.2015, which in turn arises out of an order passed by the Assessing Officer (AO) Under Section 143(3) of the Income Tax Act 1961, (in short the 'Act'), dated 29.03.2013.

2. Brief facts of the case qua the assessee are that the assessee is a reseller of the country spirit. The assessee filed his return of income for assessment year 2010-2011 on 6-10-2010 showing total income of Rs.5,49,543/-. Later on, the case was selected for scrutiny u/s.143(3) of the Act and the AO has completed the assessment by making addition of Rs.2,00,55,106/- u/s.40A(3) of the Act. The AO observed that the assessee has violated the provisions of Section 40A(3) of the Act. Therefore, the addition of Rs.2,00,55,106/- was made by the AO. As the

AO noted that all payments against purchases, exceeding Rs.20000/- were made by the assessee otherwise than by an account payee cheque drawn on a bank or on account payee draft. Therefore, the AO held that it is a clear violence of the provisions of Section 40A(3) of the Act.

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

6. I have gone through the submissions of the appellant as well as I have gone through the findings of the A.O. given in the assessment order. The arguments canvassed on behalf of the appellant have been considered in light of the issue in the assessment order framed by the AO along with materials adduced on record. It is observed that in pursuance of its activities as a retail trader of country spirit and country liquor, the appellant had incurred expenses of an amount of Rs.2,50,93,129/- on account of purchases thereof from the warehouse of the M/s. IFB-Agro Industries Ltd. and the payments to the tune of Rs.2,00,55,106/- thereof was made in cash to the collection account of such warehouse which was alleged to have fallen within the mischief of s.40A(3) of the IT. Act. The A/R appearing on behalf of the appellant had vehemently assailed the application of s. 40A(3) of the Act in respect of this transaction in view of the exclusion contained in Rule 6DD(b) of the Act. It is found that the entire business of dealing in country spirit is done within the periphery of the Department of Excise, Government of West Bengal. The Notification dated 29.08.2005 in respect of the West Bengal Excise (Supply of country spirit on Payment of Duty) Rules, 2005 lays down the procedure in respect of procurement of country spirit. It is also found that the warehouse acts under the authority of the Excise Commissioner, Government of West Bengal who is the supreme authority in respect of issuance of country spirit. Therefore the entire transaction takes place within the framework of the Notification issued by the Government of West Bengal. The facts and the points of law involved in this issue is identical to the decision of the I.T.A.T., Kolkata "A" Bench in the case of Amrai Pachwai C.S. Shop Vs. DCIT in I.T.A. No. 1251/Kol/11 dated 15.01.2014 wherein it has held as under: -

"6. We have considered the rival submissions. At the outset a perusal of the assessment order clearly shows that the AO has recognized the assessee's business in trading of country spirit and country liquor. Copy of Form of Licence issued by Durgapur Municipal Corporation and copy of Form III issued by Department of

Excise/ Govt. of W. B. were also found at pages 177 and 179 of the assessee's paper book. In any case the validity of licence of the assessee to trade in country spirit and country liquor is not the issue before us. The issue is whether the payments made by the assessee for the purchase of country spirit from the territorial licensee bottling plant IFB Agro Industries Ltd., City Centre/ Durgapur falls within the exemption provided under rule 6DD(b) of the IT Rules/1962. Admittedly the AO has recognized that the provision of rule 6DD(b) of the I T. Rules 1962 is applicable in case of payments made to government directly. This is found in page 2 of the assessment order. A perusal of the Kolkata Gazette Tuesday 20th Sept 2005 shows that the Government of West Bengal Department of Excise has issued a notification/ wherein the warehouse has been identified to mean the warehouse for supply of country spirit to the retail vendors, established at convenient places by the Commissioner at the expense of the State Government, or at the expense of a person to whom the exclusive privilege of supplying or selling country spirit by wholesale has been granted u/s 22 of the Act of a licensed wholesale vendor of country spirit. Further; it has been specifically identified that the authorised representative of the wholesale licensee shall realize the necessary amount of duty, cost price and bottling charge, if there be any at the prescribed rate and such other imposition as may be prescribed by law, from the retail vendor to whom the country spirit is to be issued form the concerned warehouse. It is also specifically mentioned in section (2) of the said notification that no retail vendor of country spirit shall deposit duty direct into the local treasury for issue of country spirit to be taken by him from the warehouse concerned which clearly shows that the warehouse is for the supply of the country liquor specifically, the warehouse is under the direct control and custody of the State Govt. The State Government has closed its doors in so far as the local treasury is concerned and the payment for the purchase of country spirit or country liquor has to be made to the warehouse, run by the government. This shows that any payment made to the warehouse, which is under the direct control of the state government, is a payment made directly to the government. Once, this is accepted then the provisions of Rule 6DD(b) of the I. T. Rules, 1962 which clearly spells out that the payment made to the government in legal tender under the rules framed by the Government, is exempted from the rigours of section 40A(3) of the Act. Here, it is noticed that the payments made by the assessee for purchase of country spirit and country liquor is to the government as per the notification issued by the government and is in legal tender specified by the notification. In the circumstances, we are of the view that the payment made by the assessee for the purchase of country liquor and country spirit from the territorial licensee bottling plant; IFB Agro Industries Ltd.. City Centre, Durgapur is protected by the exemption in terms of Rule 6DD(b) of the I.T.Rules, 1962. In the circumstances/ the addition as made by the AO and as confirmed by the Id. CIT(A) by invoking the provisions of section 40A(3) of the I T. Act 1961 stands deleted.

*Further, the I.T.A.T. Kolkata "A" Bench has reiterated its view taken in the aforesaid appeal, in the cases of Alok Kumar Das Vs. ITO I.T.A. No.1129/Kol/11 dated 21.02.2014 and Sukumar Mondal L/R Abhijit Mondal Vs. ITO in I.T.A. No. 265/Kol/14 dated 06.03.2014 which were cited by the A/R of the appellant. He also supplied the copies of such decisions. In fact, in the case of Amrai Pachwai & C.S. Shop Vs. DCIT in Appeal No. 25/CIT(A)/DGP/13-14 dated 12.03.2014 before me for the Assessment Year 2010-2011 wherein I had acceded to the plea of the appellant by following the aforesaid decision. Thus, the issue has been put to rest by the jurisdictional I.T.A.T. in a catena of decisions thereafter. Since, the fact of the instant case is *pari materia* with the facts of the aforesaid cases decided above by the I.T.A.T., Kolkata; accordingly, such ratio shall apply *mutatis mutandis* to the facts of the instant case also. Therefore, most respectfully following the aforesaid precedent cited by the A/R of the appellant, I have no hesitation to conclude that the addition in the sum of Rs. 2,00,55,106/- made by the A.O. invoking the provisions of sec 40A(3) of the Act is not justified and not warranted in the facts and circumstances of the instant case and accordingly, the A.O. is directed to delete the disallowance and addition of Rs. 2,00,55,106/-. Thus, the ground of appeal is allowed.*

7. In the result the appeal is allowed."

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

1. Whether the Ld. Commissioner of Income Tax (Appeals), Durgapur has erred on fact and law by holding that cash payment to M/s IFB Agro Industries Ltd, Panagarh is not a violation of Section 40A(3) of the I.T. Act, 1961?

2. Whether the Ld. Commissioner of Income Tax (Appeals), Durgapur has erred by holding that the cash payment to a business organization i.e. M/s IFB Agro Industries Ltd. is payment to Government for the purpose of Section 40A(3)?

3. Whether the Ld. Commissioner of Income Tax (Appeals), Durgapur has erred by holding that cash payment made to M/s IFB Agro Industries Ltd.,Panagarh is exempted as per Rule 6DD(b) read with Section 40A(3) when there are no rules to specify that this payment was required to be made in cash only?

4. That on the fact and circumstances of the case Ld. Commissioner of Income Tax (Appeals), Durgapur failed to recognize that there was any binding/obligation on the assessee to make cash purchase only.

5. That the appellant craves leave to add, alter, amend, modify, substitute, delete and/or rescind all or any grounds of appeal on or before final hearing.

4.1. Ld. DR for the revenue has vehemently submitted that the assessee has violated the provisions of Section 40A(3) of the Act. The assessee has made payment of expenditure in excess of Rs.20000/- which does not fall in any exception of Rule 6DD. Ld. DR has pointed out that the payment to IFB Agro Industries is in violation of the provisions of Section 40A(3) because M/s IFB Agro Industries is not a Government. M/s IFB Agro Industries does not fall u/s.6DD(b) of the Income Tax Rules 1962. In addition to this, IFB industries is not working as an agent between the assessee and Government, it does not fall under rule 6DD(k) of the I.T.Rules, 1962. Since IFB Agro industries is not a Government entity and there is no binding obligation to collect cash and deposit cash.

4.2. On the other hand, Id. AR for the assessee has submitted that assessee had incurred expenses of Rs.2,50,93,129/- on account of purchases from the warehouse of M/s IFB Agro Industries Ltd. and payment to the tune of Rs.2,00,55,106/- thereof was made in cash to the collection amount of such warehouse which was alleged to have fallen within the mischief of Section 40A(3) of the Act. The Ld. AR submitted that the assessee falls in the exceptions under rule 6DD(b) and under rule 6DD(k) of the Income Tax Rules. The entire business of dealing in country spirit is done within the periphery of the Department of Excise, Government of West Bengal. The Notification dated 29.08.2005 in respect

of the West Bengal Excise (Supply of country spirit on Payment of Duty) Rules, 2005 lays down the procedure in respect of procurement of country spirit. It is also found that the warehouse acts under the authority of the Excise Commissioner, Government of West Bengal who is the supreme authority in respect of issuance of country spirit. Therefore the entire transaction takes place within the framework of the Notification issued by the Government of West Bengal. Ld. AR pointed out that the issue involved in this appeal is identical to the decision of ITAT Kolkata "A" Bench in the case of Amrai Pachwai C.S. Shop Vs. DCIT in I.T.A. No. 1251/Kol/11 dated 15.01.2014. The said case law has been cited by us in our earlier para 3.

4.3. Ld. AR has also relied on the decision in the case of Ramnagar Pachwai and C.S.(S) Shop Vs. ITO, [2016] 50 ITR (Trib) 332 (Kolkata), wherein it was held as under :-

(b) A was a bottling plant cum warehouse under rule 2(vii) of the West Bengal Excise Rules, 2005 with privilege granted under section 22 of the / Bengal Excise Act, 1909. A "warehouse" referred to under these Rules was under the direct control and authority of the Commissioner of State Excise and as such was a State Government establishment specifically established for supply of country spirit to retail vendors such as the assessee alone and not to anybody else. The assessee having made cash payments for purchase of country spirit by depositing cash directly into the bank account of A in accordance with rule 6(2) of the Excise Rules, 2005, it had to be construed as payment made to the State Government authority and accordingly fell under the exception provided in rule 6DD(b) of the Income-tax Rules, 1962.

(c) the payment made by the assessee retail vendor to the Principal, Government of West Bengal through its wholesale agent. The relationship between the assessee (authorised retailer) and the Government of West Bengal (the supplier) acting under West Bengal Excise Rules through its authorised wholesaler licensee (agent), both de facto and de jure, was one of "principal" and

"agent". The assessee retail vendor-had made payment to the agent (wholesale licensee) and this would fall under the exception provided in rule 6DD(k) of the Rules.

4.4. Having heard the rival submissions, perused the material available on record, we are of the view that there is merit in the submission of the assessee, as the propositions canvassed by Id. AR for the assessee are supported by the above cited judgments of Hon`ble ITAT Kolkata (supra). As the Id. AR pointed out that the assessee did the transaction as per the notification dated 29.8.2005 in respect of the West Bengal Excise (Supply of country spirit on Payment of Duty) Rules, 2005 lays down the procedure in respect of procurement of country spirit. It is also found that the warehouse acts under the authority of the Excise Commissioner, Government of West Bengal who is the supreme authority in respect of issuance of country spirit. Therefore, the entire transaction takes place within the framework of the Notification issued by the Government of West Bengal. Once, this is accepted then the provisions of Rule 6DD(b) of the I. T. Rules, 1962, which clearly spells out that the payment made to the Government in legal tender under the rules framed by the Government, is exempted from the rigours of section 40A(3) of the Act. It is also noticed that the payments made by the assessee for purchase of country spirit and country liquor is to the government as per the notification issued by the Government and is in legal tender specified by the notification. Considering the factual position, we are of the view that there is no any

infirmity in the order of the Id. CIT(A). Therefore, we do not hesitate to confirm the order passed by the Id. CIT(A).

4.5. In the result, appeal filed by the revenue on all the grounds is dismissed.

Order pronounced in the open court on this 25/11/2016.

Sd/-
(S.S.VISWANETHRA RAVI)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)
लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 25/11/2016

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, कोलकाता / ITAT, कोलकाता