

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri P. M. Jagtap, AM & Shri K. Narasimha Chary, JM]

I.T.A No. 2079/Kol/2013
Assessment Year: 2010-11

Shri Ujjal Chatterjee
(PAN: ABXOC7916M)
(Appellant)

Vs. Assistant Commissioner of Income-tax,
Circle-3, Asansol
(Respondent)

Date of hearing: 09.11.2016
Date of pronouncement: 18.11.2016

For the Appellant: Shri V. N. Purohit, FCA
For the Respondent: Shri H. Robindro Singh, JCIT, Sr. DR

ORDER

Per Shri K. Narasimha Chary, JM:

This appeal by assessee is arising out of order of CIT(A), Asansol vide appeal No. 141/CIT(A)/ASL/ACIT/Cir-3/ASL/12-13 dated 05.06.2013. Assessment was framed by ACIT, Circle-3, Asansol u/s. 143(3) of the Income-tax Act, 1961(hereinafter referred to as the “Act”) for AY 2010-11 vide his order dated 12.10.2012.

2. Brief facts of the case are that the assessee is a civil contractor, supplier and transporter. For AY 2010-11, he filed his return of income on 05.03.2011 disclosing a total income of Rs.17, 07,077/- accompanied by tax audit report. During the course of assessment proceedings the AO found that the assessee made payment to M/s. Mongalpur Highway Service for purchase of diesel in cash and such payments exceeding Rs.20,000/- at a time amounted to Rs.26,99,935/- as such, the AO added back such amount. Further, the AO added a sum of Rs.6,20,950/- on the ground that the assessee failed to deduct tax on payment of water supply charges to the owners or syndicate of owners of water tankers. The AO thus completed the assessment reaching the total income of the assessee at Rs.53,27,960/-. Challenging the same, the assessee carried the matter in appeal before the Ld. CIT(A), who partly allowed the appeal. Ld. CIT(A) rejected the plea of the assessee that in respect of transporters the limit of cash payment is not Rs.20,000/- but Rs.35,000/-, business exigency and the plea that the payments were made by the assessee through his agents as such are safe under Rule 6DD(k) of the I. T. Rules. Ld. CIT(A) remanded the matter to the AO to verify whether certain payments said to have been made on the bank holidays and to compute the expenditure framed applicability of section 40A(3)

of the Act applying Rule 6DD of the I. T. Rules and retained the addition of Rs.26,99,935/- as reduced by the payments said to have been made on bank holidays. Ld. CIT(A) also remanded the matter to the AO for verification whether the vouchers attributable to the sum of Rs.3 lacs in respect of payment for water charges are acceptable. Aggrieved by the said order of Ld. CIT(A), the assessee carried the matter in appeal before us on the following grounds:

“1. For that under the facts and circumstances of the case, the Ld. CIT(A), Asansol erred in law as well as in facts in giving partial relief to the appellant in the matter of assessment of income which is whimsical, arbitrary and capricious in nature.

2. For that under the facts and circumstances of the case, the Ld. CIT(A) is not justified in sustaining the disallowance of Rs.25,03,375.74 out of the disallowance of Rs.26,99,935.74 made u/s. 40A(3) by the Ld. AO.”

3. It is the argument of Ld. AR that the Ld. CIT(A) committed error in not considering the business exigency, the limit applicable to the transporters for cash payment, payments made for all the bank non-working days and applicability of Rule 6DD(k) to the facts of this case. He also argued that the Ld. CIT(A) had no jurisdiction to remand the matter to the AO to verify the claims of the assessee on any grounds. The Ld. AR relied on a decision of Hon'ble Delhi High Court in M/s. Honey enterprises Vs. CIT in ITA 163/2002 & Ors. Dated 08.12.2015, in support of his submission that under exceptional or unavoidable circumstances when the assessee had to make some payments urgently at various sites failing which the business will be hampered, such circumstances have to be considered while dealing with the disallowance u/s. 40A(3) of the Act. In support of his contention that Rule 6DD(k) is applicable to the facts of the case he placed reliance on a decision in the case of R. C. Goel Vs. CIT (2013) 259 CTR 15 and also a decision of Coordinate Bench of this Tribunal in the case of Chandreswar Prasad Vs. ITO in ITA No. 2494/Kol/2013 dated 05.08.2015. He also placed reliance on a decision of jurisdictional High Court in CIT Vs. Crescent Export Syndicate, ITA No. 202 of 2008 dated 30.07.2008, in support of his argument that when genuineness of the payments or purposes was not disputed and accepted by the Department, deletion of addition u/s. 40A(3) of the Act was proper. Lastly, he relied on the decision of a Coordinate Bench of this Tribunal in ITO Vs. Satyapriya Joardar in ITA No. 196/Kol/2013 for AY 2009-10 dated 04.03.2016 for the principle that the Commissioner does not have the power to remand the matter to the AO with a direction to verify the claim of the assessee u/s. 251 of the Act.

4. Per contra, Ld. DR submitted that there was no compulsion for the assessee to make payments in cash to Mangalpur Highway Service inasmuch as such Mangalpur Highway Service denied to have forced the assessee to make payments in cash against the purchase bill of diesel. In this context, he submitted that when law and equity are pitted against each other law must prevail over equity as such on the score of business expediency the assessee cannot violate sec. 40A(3) of the Act when he has an option to make payment in cheque. Ld. DR further submitted that the Ld. CIT(A) is justified in his observation that the ceiling of Rs.35,000/- is not applicable to the case of the assessee since the cash payments were made for purchase of diesel not during the course of transport of carriage of goods. Lastly, he submitted that rule 6DD(k) has application in case of payments made by the employees of the assessee since employees are not the agents for the purpose under Rule 6DD(k) of the act. He heavily relied on the order of the Ld. CIT(A) in support of his contentions.

5. We have carefully gone through the record including the orders of the authorities below in the light of the arguments submitted on either side. It is an admitted fact that the authorities below did not dispute the genuineness of the expenditure incurred by the assessee and there is no finding that the assessee has tried to evade taxes. The account books of the assessee are not rejected by the AO. Even the account books of M/s. Mangalpur Highway Service also lent any amount of support to the claim of the assessee that he incurred such expenditure for purchase of diesel. The entire dispute revolves around the payments exceeding Rs.20,000/- in cash which is prohibited under law.

6. Though the AO at the end of paragraph 2 of his order observed that the assessee was a contractor/supplier and transporter during the previous year 2009-10, it is not the case of anyone that the expenses for purchase of diesel were incurred while conducting the transport business for carriage of goods. It is the admission of the assessee that for conducting his business of civil contract he hired vehicles Buldozers etc. and for such purpose the diesel was purchased. Incurring the expenditure shall have nexus to the purpose to attract the incentives given under the Act. Mere status of a transporter does not help the assessee to claim exemption for incurring such expenses while not conducting business in that status. We, therefore, do not find any merits in the arguments of the Ld. Counsel on this score.

7. Now coming to the business expediency as pleaded by the assessee, it is the observation of the AO that Mangalpur Highway Services has bank account and one Mr.

Sanat Kumar Bhattacharjee, Proprietor of M/s. Mangalpur Highway Services in compliance with the notice u/s. 133(6) stated that the assessee never purchased diesel on credit basis, and they never forced the assessee to make payments in cash against the purchase bill of diesel. It is, therefore, clear that though there was no agreement to allow the credit by M/s. Mangalpur Highway Services, there was an option for the assessee to make payment by way of cheque or DDs and on this aspect no proper explanation is forthcoming from the assessee. It was open for the assessee to test the veracity of the statement of the proprietor of M/s. Mangalpur Highway Services on this aspect. On this ground we are not prepared to accept the contention of the assessee that the business expediency compelled them to make cash payments.

8. Now coming to the contention of the assessee that there was immediate necessity to make payments on bank holidays is concerned, the Ld. CIT(A) took cognizance of this fact and directed the AO to verify the truth or otherwise of this fact. Though, however, the written submissions of the assessee vide paragraph no. 1.10 to 1.13 advert to some other dates also during which, according to the assessee, the bank remained closed, there is no reason as to why the other dates were not considered. The logic behind the Ld. CIT(A) seeking verification of some dates equally applies for other dates also on which the bank supposedly remains closed. We find some force in this contention of the Ld. AR.

9. So far as the applicability of sec. 6DD(k) is concerned, Ld. AR is placing reliance on two certificates said to have been issued by one M/s. Dulahari Mittal Tapukarawala and M/s. Earthmovers Equipments & Transporters who are alleged to be the agents of the assessee for purchase of the diesel. In his order the Ld. CIT(A) observed that the employees are not agents for the purpose of application of Rule 6DD(k). However, this observation is not based on any material to show that the drivers who purchased the diesel are the employees or not. Merely because the payments debited in the books of account of assessee and credited in the books of account of Mangalpur Highway Services are identical, enquiry cannot be dispensed with on this aspect more particularly when such a plea was taken before him by filing the certificates. Whether or not the diesel was purchased through agents is a question of fact which requires some enquiry on the part of the authorities below without which the observations of the Ld. CIT(A) that the employees themselves purchased the

diesel are not based on record. This fact has to be verified in a proper way.

10. Now coming to the additional ground in respect of payment of Rs. 3 lacs to the water supplier is concerned Ld. CIT(A) remanded the matter to the AO to verify whether the vouchers attributable to a sum of Rs. 3 lacs payable to M/s. Rainbow Syndicates are acceptable to allow deduction. Ld. AR assails its procedure adopted by the Ld. CIT(A) both in respect of the verification of the bank holidays as well as this acceptability of the vouchers for a sum of Rs. 3 lacs on the ground that section 251 of the Act does not permit such a jurisdiction to the Ld. CIT(A). As stated supra, he placed reliance on the decision of Satyapriya Joardar, supra wherein a coordinate bench of this Tribunal has held as follows:

“8. Heard assessee’s representative and perused the record. The main stand of the Revenue as taken in grounds of this appeal is that the Commissioner does not have the powers in remanding the matter to AO with a direction to verify the claim of the assessee under section 251 of the Act whereas it is observed from the provision of section 251 of the Act that the Commissioner is not having the power to send back the file to AO to verify the claim of the assessee. The only power available to him to exercise under section 251 of the Act is that he may confirm reduce, enhance or annul the assessment, besides the other clauses contained therein. We, therefore, set aside the impugned order of the Ld. CIT(A) on this issue and remit the matter back to him with a direction to decide the same on merit, after giving the assessee proper and sufficient opportunity of being heard.”

11. On a careful consideration of the matter we are in agreement with the findings of the coordinate bench of this Tribunal in the case of Satyapriya Joardar, supra and while respectfully following the same we hold that under section 251 of the Act, the CIT(A) may confirm, reduce, enhance or annul the assessment but cannot send back to AO to verify any aspect of the claim of the assessee. We, therefore, find it just and proper to set aside the matter to the file of Ld. CIT(A) for deciding himself the aspects of applicability of rule 6DD(k) of the Rules and payments made on holidays and allowability of vouchers to the tune of Rs. 3 lakhs for deduction. The appeal of the assessee is allowed for statistical purposes.

12. Appeal of assessee is allowed for statistical purposes.

Order is pronounced in the open court on 18.11.2016

Sd/-
(P. M. Jagtap)
Accountant Member

Sd/-
(K. Narasimha Chary)
Judicial Member

Dated : 18th November, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Ujjal Chatterjee, Goenka Park, N. S. B. Road, P.O. Raniganj, Dist. Burdwan, Pin-713347, W.B.
- 2 Respondent –ACIT, Circle-3, Asansol
3. The CIT(A), Asansol
4. CIT , Asansol
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.