

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH,
KOLKATA**

Before : **Shri M.Balaganesh, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

I.T.A. No. 176/KOL/2014
A.Y: 2008-09

Smt Urmit Shit
PAN: BKYPS1389B
(Appellant)

Vs.

Income-tax Officer
Ward 1(4), Asansol
(Respondent)

Appearances by:

Shri R.N.Ram, Id. AR for the Assessee
Md.Ghyas uddin, JCIT, Id. Sr.DR for the Revenue

Date of hearing : 17-11-2016
Date of pronouncement : 25-11-2016

ORDER

Shri S.S. Viswanethra Ravi, JM :-

This appeal by the Assessee is directed against the order dated 25-11-2013 of the Commissioner of Income Tax (Appeals), Asansol for the assessment year 2008-09.

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

1. That the Id. CIT(A) erred in sustaining the order of the Id. A.O. disallowing a sum of Rs.42,51,604/- being the purchase consideration (including Duty and tax) of Country Spirit for violation of provisions of Sec.40A(3) of the I.T.Act, 1961 on the ground that such purchase consideration was allegedly paid in cash to the supplier.

1. (a) That since the entire amount of Rs.42,51,604/- was admittedly paid to the bank in the account of the supplier maintained in the said bank, the payment was covered by Rule 6DD(a)(i) of the I.T.Rules and therefore the provisions of Sec. 40A(3) were not attracted.

ITA No. 176/Kol/14
Smt. Urmit Shit 1

1. (b) That since, on the facts and in the circumstances of the case, the bank in which the cash payments were made by the assessee impliedly became his agent and as the bank was required to make cash payments to the supplier who was its customer, all the conditions prescribed in Rule 6DD(k) of the I.T.Rules were satisfied and therefore such payments through Bank escaped the provisions of Sec. 40A(3) of the I.T.Act.

2. That, the appellant craves leave to alter, amend, rescind and substitute any of the above mentioned grounds and add any further grounds before or at the time of hearing of the appeal.

3. The assessee is an individual and dealing in the business of country spirit. The Assessee filed her return of income declaring total income of Rs.1,92,165/-, Under scrutiny notice U/s. 143(2) and thereafter notice U/s. 142(1) were issued, in response to which, the Assessee appeared and explained the return of income.

4. The AO found the assessee purchased country spirit from Asansol Bottling Plant in cash to an extent of Rs.42,51,604/-, according to him, which is excess of Rs.20,000/- and not satisfied with the explanation offered by the Assessee, the AO disallowed an amount of Rs. 42,51,604/- for violation of provisions of Section 40A(3) Act. The AO also found a difference in opening stock and closing stock basing on the cost price and the difference thereon to an extent of Rs.2,048/- and both, added to the returned income of the assessee.

5. Before the CIT-A, the Assessee contended that Rule 6(2) of West Bengal Excise (Supply of Country Spirit on Payment of Duty) Rules, 2005 debars direct payment to local treasury for issue of country spirit. The said bottling company receiving the payment on behalf of Government of West Bengal and the cost price is deposited in bank account belonging to the said bottling company and the provisions of section 40A(3) of the Act is not

applicable. Considering the submissions, the CIT-A confirmed the disallowance and additions made thereon. The relevant portion of which is reproduced herein below:

"6. 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.

7. The entire submissions have been considered. To reinforce question A, it is reiterated that every payment to Govt is not covered under rule 6DD(b). As stated in paragraph 3 there must be existing rule to pay by cash. To reinforce my findings further it is added that if it is not so there was not need for issuing Circular No. 34 dated 05.03.1970 which states that payment of freight charges/booking of wagon to Indian Railways is not covered by section 40A(3). In regard to question B, no case has been made by appellant that by any stretch of reasoning that bottling plant is Government at least for the purpose of applying rule 6DD(b). Further no case is made for separation of a composite payment for effecting partial disallowance. In any case such selective application is impermissible as per law. In view of this discussion, I uphold the addition made by Assessing Officer. The ground against disallowance under section 40A(3) is dismissed."

6. Aggrieved by such order of the CIT-A, now the assessee is in appeal by raising the above mentioned grounds.

7. The Ld.AR submits that the issue in hand is covered by the orders of Kolkata Tribunal in the case of Ramnagar Pachwai & C.S.(S) Shop vs ITO and M/s Nuni Chinchuria Pachwai & C.S.Shop and relied on the same. The Ld.AR placed on record a copy of license for the bottling of country spirit under form no-1 and argued that the said license was issued by the Collector Burdwan West Area, West Bengal authorising the said bottling

company to sell by wholesale of country spirit. On the contrary, the Ld.DR drew our attention to the page no-4 of impugned order wherein the CIT-A referred to the decision of Special Bench, Kolkata in the case of ITO vs M/s Kenaram Saha and submitted that the Special Bench rendered the decision in favour of Revenue in the context of Section 40A(3) of the Act, while dealing with the Kerosene dealer who purchases the kerosene from specified dealer and relied on the orders of authorities below.

8. Heard rival submissions and perused the material available on record. It is observed that the issue involved in this appeal of the assessee relating to the disallowance under section 40A(3) is squarely covered in favour of the assessee by the various decisions of this Tribunal. In one of such cases, namely M/s. Amrai Pachwai & C.S. Shop decided by the Tribunal vide its order dated 15.01.2014 passed in ITA No. 1251/KOL/2011, payments were made by the assessee against purchases made from the same party, namely M/s. Asansol Bottling & Packing Co. Pvt. Limited by depositing the cash directly in the Bank account of the said supplier in the sums exceeding Rs.20,000/- and the disallowance made for the same under section 40A(3) was deleted by the Tribunal.

9. But, with regard to the submissions of the Ld. DR in respect of decision in the case of ITO vs. Kenaram Saha & Subhash Saha reported in 116 ITD 0001 (Kol) as considered by the CIT-A in the impugned order and the operative portion of the decision *supra* is reproduced herein below for ready reference:

18.1 *We have considered the rival submissions and perused the material placed before us. After hearing both the parties and perusing the order of the CIT(A), we find that the CIT(A) deleted the disallowance without giving any finding with regard to any specific clause of r. 6DD in which the assessee's case falls. As we have already discussed that once there is payment of any expenditure in violation of s. 40A(3), the assessee can escape the disallowance under the said section only if assessee's case falls within the ambit of any of the clauses of r. 6DD. The matter was required to be examined whether assessee's case falls under any specific clause. In this case we find that neither the assessee properly claimed nor the AO examined the case with reference to the relevant rule. Even before the CIT(A) the position did not change. But the arguments of the assessee's counsel were having regard to business expediency, smallness of assessee's capital, assessee being new to the business, etc. payment in cash was made. At the time of hearing before us, the assessee made a specific claim that the cash payment was made to the agent who in turn was required to make the payment in cash to the sellers of such goods. Therefore, assessee's case falls within the ambit of cl. (l) of r. 6DD and this was the claim before the Revenue authorities. However, this claim has to be examined in accordance with law. In the above circumstances, in our opinion, it would meet the ends of justice if the orders of the authorities below on this point are set aside and the matter is restored back to the file of the AO with the direction that he will allow adequate opportunity to the assessee to produce the necessary evidence in support of his claim. Thereafter the AO will readjudicate the matter in accordance with law and in the light of our observations/findings in this order.*

10. The facts of the aforementioned case are that the assessee is an AOP and is a big dealer in the chain of agents involved in the public distribution system for supply of kerosene oil within the State of West Bengal. During the year under consideration the assessee therein made the payment of Rs. 1,34,58,430 for purchase of kerosene oil in cash exceeding Rs. 20,000. According to AO, the payment was in violation of the provisions of s. 40A(3) and disallowed 20% of the payment made by the assessee to an extent of Rs. 26,91,680/-. In first appeal, the CIT-A deleted the disallowance holding that the assessee's case is covered under Rule 6DD(k) as well as Rule. 6DD(l) of Income Tax Rules. The Special Bench found that the assessee claimed that the agent is the representative of Government of West Bengal and, therefore, payment made to the agent being representative of Government of West Bengal is a payment to the Government of West Bengal. But, However, the Special Bench found no claim, as such, was made by the assessee before the AO

and the Bench opined the claim of the assessee would require examination, accordingly, restored the matter back to the file of the AO with the direction that he shall examine the assessee's contention whether its case falls under cls. (b), (k) and (l) of Rule 6DD. Therefore, we find no observation as made by the Special Bench in favour of the Revenue as observed by the CIT-A in his order and as relied by the Ld.DR before us. Thus, we are of the opinion as there was no categorical finding of the Special Bench relating to the issue on hand and reject the contentions of the Respondent Revenue in this regard.

11. Now, let us examine the decision of the Tribunal vide its order dated 15.01.2014 passed in ITA No. 1251/KOL/2011 in the case of M/s. Amrai Pachwai & C.S. Shop, wherein it held that M/s. Asansol Bottling & Packaging Co. Pvt. Ltd. is a bottling plant cum warehouse under Rule 2(vii) of the West Bengal Excise Rules, 2005 and is a licensed wholesale vendor of country spirit granted power under section 22 of the Bengal Excise Act and further held that the cash payments made by depositing into the bank account of M/s Asansol Bottling & Packaging Co Pvt Limited by the retail vendor for purchase of country spirit as per Rule 6(2) of the Excise Rules 2005 has to be construed as payment made to the State Government authority in terms of the exception as provided in Rule 6DD(b) and for better understanding, the following reasons given in paragraphs no. 21 & 22 of its order is reproduced as under:-

"21. We find that M/s. Asansol Bottling & Packaging Co. Pvt. Ltd. is a bottling plant cum warehouse under Rule 2(vii) of the West Bengal Excise Rules, 2005 with privilege granted u/s 22 of The Bengal Excise Act, 1909. At this juncture, it would be relevant to go into the definition of warehouse as provided under the State Excise Rules, 2005, as below:-

"Warehouse", under Rule 2(vii) of the W.B. Excise Rules, 2005, means the warehouse for supply of

country spirit to 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 under section 22 of the Act, or of a licensed wholesale vendor of country spirit.

The above definition makes it clear that the 'warehouse' referred to under the State Excise Rules is under the direct control and authority of the Commissioner of State Excise because it is established by the Commissioner of State Excise and as such is a State Government establishment. It is also pertinent to note that the expenditure in relation to such warehouse is borne by the State Government or by the licensee to whom the exclusive privilege is granted u/s 22 of the Bengal Excise Act, 1909. Hence there could be no doubt that the warehouse is established by the State Excise Commissioner. Hence it could be safely concluded that the warehouse so established by the State Excise Commissioner is a State Government establishment. It would also be pertinent to note that the said warehouse has been specifically established for supply of country spirit to retail vendors (assessee herein) only and not to anybody else.

It would be pertinent to look into the definition of 'Wholesale licensee' as per Rule 2(viii) of the Excise Rules 2005 as below.-

Rule 2(viii) - "Wholesale licensee" means the wholesale vendor of country spirit to whom licence has been granted in West Bengal Excise Form No. 26.

It would be pertinent to look into Section 22 of The Bengal Excise Act. 1909 at this juncture as below:-

Section 22 - Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs -

(1) The State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege -

- (a) of manufacturing, or supplying by wholesale, or*
- (b) of manufacturing, and supplying by wholesale, or*
- (c) of selling, by wholesale or retail. or*
- (d) of manufacturing or supplying by wholesale and selling retail, or*
- (e) of manufacturing and supplying by wholesale and selling retail,*

any country liquor or intoxicating drug within any specified local area:

Provided that public notice shall be given to the intention to grant any such exclusive privilege. and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner.

Hence it could be safely concluded that M/s. Asansol Bottling & Packaging Co. Pvt Ltd (Bottling Plant) is a warehouse within the meaning of Rule 2(vii) of the Excise Rules 2005 and said warehouse is a State Government establishment, established and controlled by the Excise Commissioner. It would be relevant to reproduce Rule 6DD(b) of the IT Rules at this juncture;-

(b) where the payment is made to the Government and, under the rules framed by it, such payment is required to be made in legal tender.

In the instant case, the assessee (retail vendor) had made cash payments for purchase of country spirit by depositing cash directly into the bank account of M/s ABPL as per Rule 6(2) of the Excise Rules 2005, it has to be construed as payment made to the State Government authority and accordingly falls under the exception provided in Rule 6DD(b) of the IT Rules.

22. It is not in dispute that M/s Asansol Bottling & Packaging Co. Pvt Ltd have been granted licence to act as a wholesaler for supply of country liquor to the retail vendor as per the regulations of the Excise Department, Government of West Bengal. At the cost of repetition, we would like to state that the said regulation mandated the payments to be made directly into the bank account of the said wholesale licensee by the retail vendor (i.e assessee herein) for strict and effective regulation of the country liquor and for prevention of spurious stocks and black marketing transactions from the same. Hence it could be safely concluded that the said wholesale licensee had acted at the instance of the State Government. Once this is so, then the said wholesale licensee could be construed as an agent of the State Government. For the sake of convenience, the relevant rule is reproduced hereunder:-

Rule 6DD(k) - where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person.

The payment made by the assessee retail vendor to the Principal, Government of West Bengal through its wholesale agent. The relationship between the assessee (authorized retailer) and Government of West Bengal (the supplier) acting under West Bengal Excise Rules through its Authorised Wholesaler Licensee (Agent), both defacto and dejure, is one of 'Principal' and 'Agent'. We hold that the assessee retail vendor had made payment to the said agent (wholesale licensee) would fall under the exception provided in Rule 6DD(k) of the Rules”.

12. We also find on record a copy of license for the bottling of country spirit under form no-1 as placed by the Ld.AR and on perusal of the same the said license was issued by the Collector Burdwan West Area, West Bengal authorising the said bottling company to sell by wholesale of country spirit and Rule 2(viii) of Excise Rules 2005 defines the "Wholesale licensee" means the wholesale vendor of country spirit to whom licence has been granted in West Bengal Excise Form No. 26.

13. As the issue involved in the present appeal as well as all the material facts relevant thereto are similar to the case of M/s. Amrai Pachwai & C.S. Shop *supra*, we respectfully follow the decision rendered by the Coordinate Bench of this Tribunal in the said case and delete the disallowance made by the Assessing Officer and confirmed by the CIT-A under section 40A(3) of the Act.

14. In the result, the appeal of the Assessee is allowed

Order Pronounced in the Open Court on 25th November, 2016

Sd/-
M.BALAGANESH
ACCOUNTANT MEMBER

Sd/-
S.S.VISWANETHRA RAVI
JUDICIAL MEMBER

Dated: 25-11-2016

Copy of the order forwarded to:-

1. *The Appellant/Assessee: Smt. Urmi Shit Prop M/s. Sunderchak C.S Shop, G.T Road, Klti, Kultora, Dist: Burdwan Pin 713359.*
2. *The Respondent/Revenue: Income Tax Officer, Ward 1(4), Asansol.*
3. *CIT*
4. *CIT(A)*
5. *The Departmental Representative*
6. *Guard File*

True Copy

By order

** PRADIP SPS

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata