**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA**
[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

**I.T.A No. 1588/Kol/2013**
**Assessment Year: 2009-10**

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| M/s. Excel Engineers<br>(PAN: AACFE0622L)<br>(Appellant) | Vs. | Joint Commissioner of Income-tax,<br>(OSD)-51, Kolkata.<br>(Respondent) |

Date of hearing: 18.10.2016
Date of pronouncement: 25.11.2016

For the Appellant: Shri Subhas Agarwal, Advocate
For the Respondent: Shri Debnath Lahiri, JCIT

**ORDER**

**Per Shri M. Balaganesh, AM:**

This appeal by assessee is arising out of order of CIT(A)-XXXII, Kolkata vide Appeal No. 107/XXXII/11-12/51/Kol dated 07.03.2013. Assessment was framed by JCIT(OSD), circle-51, Kolkata u/s. 143(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AY 2009-10 vide his order dated 16.12.2011.

2. The first issue to be decided in this appeal is as to whether the ld CITA is justified in upholding the disallowance made u/s 40(a)(ia) of the Act in the sum of Rs. 68,49,395/- in the facts and circumstances of the case.

2.1. The brief facts of this issue is that the assessee is a contractor engaged in the Commissioning of Communication Towers and manufacturing of Transformers. During the course of assessment proceedings, the ld AO observed that the assessee had made payment to subcontractor amounting to Rs. 21,45,387/- and labour charges payment amounting to Rs. 47,04,008/- without deduction of tax at source. The ld AO directed the assessee to produce the labour register and stated that the representative of the assessee informed that the same was not maintained. Accordingly, the ld AO proceeded to make disallowance u/s 40(a)(ia) of the Act in the sum of Rs. 68,49,395/- in the assessment.

2.2. Before the ld CITA, the assessee submitted various details as additional evidences in respect of the aforesaid two expenditures. It was stated that these documents were produced before the ld AO in the form of site wise chart, nature of work etc but the ld AO did not take cognizance of the same since the same were in loose leaf form and the ld AO demanded in bound book register form. In respect of labour payments of Rs. 47,04,008/- , the assessee remitted payments to his staff (site in charge / supervisors) of different sites who in turn made payments to labourers and weekly workmen sheets were prepared at each site in a proper form containing relevant details viz. nature of job done, days of working and payments made. The payments made to individual labourers were too low and outside the ambit of section 40(a)(ia) of the Act. In respect of contractor payment of Rs. 21,45,387/- , remittance was made to site in charge / supervisors who appointed local contractors to perform petty works at different sites. Individual payments made to the contractors were below the threshold limit prescribed u/s 194C of the Act. The ld CITA obtained remand report from the ld AO in respect of these evidences. The ld AO in his remand report dated 15.6.2012 stated as below:-

Labour payments of Rs. 47,04,008/-

Assessee only produced copy of ledger account from each side. No evidence was adduced that money was actually remitted to the site supervisors / staff in charge. As per ledger accounts, regular payments to sundry parties exceeding Rs 50,000/- were made. So assessee was liable to TDS u/s 194C of the Act.

Sub-contractor payment of Rs. 21,45,387/-

No evidence in support of identity of staff, mode of remittance and documents in support of disbursement was submitted. Entire payments were made to one Prasanna Vaishya.

2.2.1. The assessee filed his rejoinder to the remand report before the ld CITA separately for two expenditures .

Labour payments of Rs. 47,04,008/-

The ld AO had stated that no evidence was adduced that money was actually remitted to the site supervisors / staff in charge. This was never asked for by the ld AO in the remand proceedings. The staff in charge prepares work sheet at different sites incorporating

relevant details and also signatures of final recipients. Vouchers are also maintained. Payments made to each labourer does not exceed Rs. 7,500/-. Work sheets are collected by the office from sites at fixed intervals and the same are kept in the master file. Since the ld AO was not taking cognizance of the work sheets as they are not maintained in bound book form, but instead maintained in loose leaf form, photo copies of all the work sheets were submitted.

Sub-contractor payment of Rs. 21,45,387/-

Mr Prasanna Vaishya is the site in charge of the assessee. He gets small jobs at sites completed through local contractors. The payments are made to the contractors on the basis of work sheets. Vouchers are also maintained. The payment made to each contractor does not exceed Rs. 20,000/-. Photocopies of all the work sheets were submitted.

2.2.2. Based on these submissions, the ld CITA called for a second remand report from the ld AO which was submitted by the ld AO on 8.10.2012. The ld AO recorded a categorical assertion that the labour payment sheets and sub contract expense sheets were examined by him. In the original proceedings, the assessee was called upon to produce labour register which was not produced. The labour sheets were not filed then nor were their existence referred to. However, the assessee submitted the group summary of labour expenses at the sites. The workman sheets have been planned in post assessment period just to serve own purpose. The assertion by assessee's AR Shri P.C.Soni, FCA that the sheets produced during the assessment were not taken cognizance of by the ld AO since they were not in bound form is a lie since the AR could not show the said finding from the records.

2.2.3. The assessee filed the rebuttal in respect of the second remand report that the aspersion cast on the AR by the ld AO was strongly objected to. It was reiterated that when he produced the worksheet during the assessment proceedings, he refused to accept the same. The ld AO should have avoided the harsh remarks on the AR. The payments made to labour or worker were duly recorded in the cash book. Hence the said sheets produced in the appellate proceedings were not additional evidence.

2.2.4. The ld CITA observed that from the details filed, it was found that the signature of the labourers were not matching and their addresses were not given in the worksheets. He shifted his observations to violation of section 40A(3) of the Act and ultimately upheld the disallowance of Rs. 68,49,395/- made u/s 40(a)(ia) of the Act.

2.3. Aggrieved, the assessee is in appeal before us on the following ground:-

> *"1. The order of the Ld. CIT(A)-XXXII, confirming the addition of Rs.68,49,395/- u/s. 40(a)(ia) of the I. T. Act, 1961 made by the Ld. AO is contrary to the law and facts of the case."*

2.4. The ld AR argued that the ld AO wrongly cast aspersions on a senior AR who is a qualified professional. In response to this assertion that the then AO refused to take cognizance of the labour payment / contractor payment work sheets as they were not in bound book form. It is pertinent to note that when cognizance of any evidence produced is not taken, the record of the same is not found in the order sheets / assessment records. He argued that the ld AO submitting the remand report had no where referred to any communication with the then AO to rebut the assessee's assertion before levying wild allegation and dubbing the AR to be a liar. In any case, the ld CITA had called for a remand report from the present AO on the documents submitted before him. The present AO had duly examined the documents in the remand proceedings. This fact is proved by his assertion in the second remand report which is reproduced at page 5 of the ld CITA's order. He later took us to the relevant pages of the paper book explaining the various documents and evidences submitted before the lower authorities namely pages 41 to 76 of paper book and pages 96 to 132 of the paper book.

2.5. The ld DR vehemently relied on the orders of the lower authorities and argued that the ld CITA had also verified the books and had come to the conclusion that the provisions of section 194C of the Act were attracted. He argued that if the payments were made to the employees by the assessee, there was no need for them to split the payments made in a single day into more than one voucher below Rs 20,000/-. This itself goes to prove that they were not employees of the assessee.

2.6. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee comprising of Group summary of labour payments (area wise) vide page 13 of the PB Volume I, ledger of labour payments vide pages 14 to 33 of PB Volume I, details of payments made through persons in charges vide pages 34 to 40 of PB Volume I, sample workman sheet vide pages 41 to 76 of PB Volume I, details of payments made to staff (permanent and casual0 vide pages 77 to 81 of PB Volume I, ledger of subcontract expenses vide pages 82 to 92 of PB Volume I, details of sub contract expenses (project site wise) vide pages 93 to 95 of PB Volume I and sample workman sheets vide pages 96 to 132 of PB Volume I and copies of various written submissions filed before the lower authorities vide pages 212 to 232 of PB Volume II. We find in the remand report, the ld AO had recorded the fact that the sheets filed by the assessee contain all the relevant details viz. date, project site, name of the person in charge, name of the labourer, working days, day wise charge, total charge, net paid and signature or finger impression of the labourer. The ld AO also recorded that similar sheets for subcontract expenses were also submitted. We find that the ld AO in the remand report apart from hurling wild allegation upon the senior AR who appeared before him and alleging without any basis that these sheets have been planned in post assessment period, have not found any infirmity in the said sheets. The assessment and remand proceedings, being enquiry based proceedings, the ld AO on opportunity being duly given to him, had failed to bring any adverse material on record. Thus the assertion of the assessee that the assessee remitted payments to the site in charge / supervisors who in turn made payments to the labourers or contractors and payments to individual labourers were below the limit prescribed for tax deduction u/s 194C of the act remains unrebutted. Hence it could be safely concluded that the payments were ultimately made to the labours and contractors through the medium of site in charge or supervisors who are the casual staff of the assessee appointed for supervising the work at the work site (viz Kanu Paul, P.K.Sen, Raju Mallick, Raja Roy, ….. etc) where work of erecting telecom towers is carried on for a short duration only. The details of the payments separately made to them for the supervision work were submitted before the ld CITA (vide pages 77, 80& 81 of the paper book) as the ld AO did not ask for such details. The copies of the workmen sheets relating to payments made to labours (pages 41 to 76 of paper book) and to contractors (pages 96 to 132 of paper book) were submitted

which contain various details and signatures of recipients. Further details like – group summary of labour payments (area wise) , ledger of labour payments, details of payments made through person in charge, ledger of subcontract expenses, details of sub contract expenses project site wise, which were all submitted before the lower authorities clearly demonstrates that the payments were received by the labours and contractors through the site in charge or supervisors and each payment was below the prescribed limit of section 194C. We find that the authorities had wrongly considered the remittances made to the site in charge as the payment to the labour contractors whereas the records of the assessee indicate that the payments were made to the labourers through the medium of site in charge. Hence we are not inclined to accept the arguments of the ld DR. We also find that the ld CITA had made bald statement that the signatures in the sheets were not matching. It is not known from which document he was able to reach such conclusion for comparison of the signatures. Accordingly we hold that there is no violation of provisions of section 194C of the Act warranting disallowance u/s 40(a)(ia) of the Act. The ld AO is directed to delete this disallowance u/s 40(a)(ia) of the Act in the sum of Rs. 68,49,395/-. Accordingly, the Ground No. 1 raised by the assessee is allowed.

3. The ld AR during the course of hearing stated that he is not pressing Ground No.2 raised by the assessee on the estimated disallowance of expenses. The same is reckoned as a statement from the Bar and accordingly the Ground No. 2 raised by the assessee is dismissed as not pressed.

4. The last ground to be decided in this appeal is as to whether the ld CITA is justified in upholding the disallowance made u/s 40A(3) of the Act to the tune of Rs. 41,05,364/- and further enhancing the disallowance thereon to Rs. 66,44,453/- in the facts and circumstances of the case.

4.1. The brief facts of this issue is that the ld AO observed from the cash book of the assessee that the payments made to following parties were made in cash :-

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| Zazmaliana & Sons | 13,50,790 |
| Shanti Trading Company | 13,61,208 |
| New Stores, Silchar | 4,85,588 |

| | | |
|---|---|---|
| Prasanna Baishya | 2,53,629 | |
| Maa Durga Stores | 9,99,490 | |
| Jai Bhavani | 10,15,867 | |
| | ---------- | 54,66,572 |

The ld AO observed that the purchases were made from these parties by the assesese from different dates throughout the year. The assessee replied that these expenses were incurred in purchase of cement, sand, stones, iron, concrete, etc, which are construction materials for contract jobs and the nature of work and sites of work were all mostly villages and hence the assessee was left with no other option but to make payment in cash. The ld AO however invoked the provisions of section 40A(3) of the Act and made disallowance of Rs. 54,66,572/- in the assessment.

4.2. The assessee submitted that the assessee had been allotted work in small sites in village areas by different telecom companies in different state of the North Eastern Region, such as Assam , Mizoram, Tripura and others, where the assessee have to complete the work in 3 to 4 weeks and the places were job allotted to the assessee were new and the people of the locality were new to the assessee and the assessee was also new to them. Payments in cash were made towards purchase of materials like cement, sand, iron rods, concrete etc as the assessee was executing works in different sites, which were small villages having no banking facilities nor they have any branch of the assessee's bank. The assessee was forced to make payments to these parties in cash as the parties insisted for payments only by cash and were not willing to supply the materials if cheque was issued. Moreover, the assessee had to complete the entire job within the allotted time of 3 to 4 weeks, the assessee had no other option but to make payments in cash and procure the necessary materials. Accordingly it instructed the site in charge / supervisors to purchase materials for different sites as and when required from the aforesaid parties from time to time who in turn made payments in cash accordingly. It was submitted that one site has no information about the facts that whether the other site had purchased any materials from the above parties. Accordingly it was argued that the material purchased from the above mentioned parties have been made by the site in charge / supervisors of different sites without having knowledge of the fact that whether the site in charge / supervisors of any other site had purchased the material from the above parties. The cash debit vouchers were supported by the proper purchase

bills of different sites. With regard to purchases made from Shanti Trading Company to the tune of Rs. 13,61,208/- it was submitted that no payment was made in the year under appeal and hence in any case, the disallowance made thereon u/s 40A(3) of the Act is to be deleted as the said party is shown as sundry creditor in the balance sheet of the assessee. The said party was settled in the subsequent year. It was also submitted that the payments to the tune of Rs. 2,53,629/- were made to Mr Prasanna Baishya who was the employee of the assessee. The assessee had remitted cash to the said employee for meeting site expenses and accordingly the said employee had made purchase out of that amount, purchase bills of the purchase made by the employee has been supported by proper bills were attached to the cash debit vouchers. It was submitted that the ld AO had wrongly assumed this person to be supplier of materials to assessee. It was submitted that the individual purchase invoice for which payment was made was below Rs 20,000/- which is not disputed.

4.3. The ld CITA granted relief in respect of purchases from Shanti Trading Company as the said party is reflected as sundry creditor in the balance sheet and no payments have been made during the year under appeal in cash warranting disallowance u/s 40A(3) of the Act and accordingly directed the ld AO to delete the sum of Rs. 13,61,208/-. However, he did not appreciate the various contentions raised by the assessee and confirmed the remaining disallowance of Rs. 41,05,364/- made by the ld AO. Apart from this, he found that the assessee had made further cash payments for purchase of goods warranting further disallowance u/s 40A(3) of the Act. He accordingly enhanced the disallowance by further sum of Rs. 25,39,089/- and brought the total disallowance to Rs. 66,44,453/-. Aggrieved, the assessee is in appeal before us on the following ground:-

> *"3. The order of Ld. CIT(A) confirming the addition of Rs.41,05,364/- out of the total disallowance of Rs.54,66,572/- u/s. 40A(3) of the I. T. Act, 1961 made by the Ld. AO and enhancing the disallowance to Rs.66,44,453/- is contrary to the law and facts of the case."*

4.4. The ld AR reiterated the submissions made before the lower authorities and drew the attention of the bench to various pages enclosed in the paper book and circumstances that led the assessee to make payments in cash to various suppliers for purchase of materials through its site in charge / supervisors who were employees of the assessee. Admittedly the suppliers insisted for payments to be made only in cash and assessee had no other option to follow the said instruction in order to procure the materials required for execution of the

project in time. He argued that the intention of provisions of section 40A(3) of the Act have been duly met by the assessee and assessee had not contributed anything by inducing the other parties for generation of black money. The suppliers had also duly acknowledged the receipt of cash payments and had disclosed in their books which is not disputed by the revenue. Hence the genuinity of the entire transactions were never doubted by the revenue and hence no disallowance u/s 40A(3) of the Act could be made. He further argued the provisions of section 40A(3) of the Act states as under:-

> *"Where the assessee incurs any expenditure 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, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure."*

He argued that the above provisions clearly states that if aggregate payment made in cash to the same person in a single day exceeds Rs 20,000/- the provisions of section 40A(3) of the Act will be attracted and entire expenditure will be disallowed, but section 40A(3) of the Act is silent regarding the cash payments made with respect to each bill in a day which are below Rs 20,000/-. In support of this proposition, he placed reliance on the decision of the Cochin Tribunal in the case of Raja & Co vs DCIT in ITA No. 534/Coch/2011 dated 22.3.2013. He also placed reliance on the following high court decisions in support of various propositions made out in his arguments :-

*Attar Singh Gurmukh Singh vs ITO reported in (1991) 191 ITR 667 (SC)*
*CIT vs CPL Tannery reported in (2009) 318 ITR 179 (Cal)*
*CIT vs Crescent Export Syndicate in ITA No. 202 of 2008 dated 30.7.2008 – Calcutta High Court*
*Anupam Teleservices vs ITO reported in (2014) 43 taxmann.com 199 (Guj)*
*Sri Laxmi Satyanarayana Oil Mill vs CIT reported in (2014) 49 taxmann.com 363 (AP)*

4.5. In response to this, the ld DR argued that the case laws relied upon by the ld AR were prior to the amendment brought from 1.4.2009 and hence not applicable. He vehemently relied on the orders of the lower authorities.

4.6. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee comprising of group summary of purchases vide page 134 of PB Volume I , ledger of purchases (broad area wise) in the books vide pages 135 to 186 of the PB Volume I and details of purchases (area wise) vide pages 187 to 211 of

PB Volume I. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. Admittedly the payments were made to the aforesaid parties in cash by the assessee. It is not in dispute before us that the said suppliers had also duly acknowledged the receipt of monies from the assessee which is also quite evident from the subsequent supplies made by them to the assessee at different sites during the year and also in subsequent year. The ledger accounts also support the contention that the cash payments made have been duly reflected in their accounts. The assessee submitted that the payments were forced to be made in cash for procuring the materials at different sites situated in remote villages as the project is to be executed and completed within 3 to 4 weeks of allotment and that the said suppliers were not willing to supply the materials if the payments were made by cheques and they insisted for payments in cash. It is not in dispute that the supply of materials had happened through out the year at different sites but at each site, the job allotted to the assessee was supposed to be executed within a short duration of 3 to 4 weeks. These facts have not been controverted by the revenue before us. Accordingly the payments were made to the parties in cash by the assessee through his employees who were site in charge / supervisors at various sites and it is not in dispute that the bulk payments were transferred to the employees by the assessee and those employees inturn make payment for purchase of materials as and when needed by making cash payments. It is not in dispute that the individual purchase bill for which payment was made was much below Rs 20,000/- for which expenditure was incurred. All the purchase bills were also produced by the ld AR in his paper book filed.

4.6.1. We find that the *Hon'ble Supreme Court had held in the case of Attar Singh Gurmukh Singh vs ITO reported in (1991) 191 ITR 667 (SC)* had held as below:-

> *It will be clear from the provisions of section 40A(3) and Rule 6DD that they are intended to regulate the business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions. In interpreting a taxing statute the court cannot be oblivious of the proliferation of black money which is under circulation in the country. Any restraint intended to curb the chances and opportunities to use or create black money should not be regarded as curtailing the freedom of trade or business.*

It is not in dispute before us that the said suppliers of materials had disclosed these sums in their accounts and assessee had not induced those parties for generation of any black money or unaccounted money. In the instant case, the ld AR argued that the suppliers insisted for

payments in cash and not by cheques for supply of materials at distant village destinations where projects were executed by the assessee. It is not in dispute that the employees of the assessee who were site in charge / supervisors situated at different site locations had approached these suppliers who do not know each other and hence the suppliers insisting on cash payments thereon has to be accepted and cannot be doubted / faulted with. It has already been stated that the site in charge / supervisors do not know the fact as to whether the materials were purchased from the same suppliers by different / other site in charge. We also find that the provisions of section 40A(3) of the Act contains a proviso which says as under :-

> *"Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section where 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, exceeds twenty thousand rupees, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors."*

It could be seen that the consideration of business expediency factors have not been dispensed with in the amended provisions of section 40A(3) of the Act w.e.f. 1.4.09.

4.6.2. We draw support from the following case laws in support of the aforesaid contentions :-

> *CIT vs CPL Tannery reported in (2009) 318 ITR 179 (Cal)*
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> *The second contention of the assessee that owing to business expediency, obligation and exigency, the assessee had to make cash payment for purchase of goods so essential for carrying on of his business, was also not disputed by the AO. The genuinity of transactions, rate of gross profit or the fact that the bonafide of the assessee that payments are made to producers of hides and skin are also neither doubted nor disputed by the AO. On the basis of these facts it is not justified on the part of the AO to disallow 20% of the payments made u/s 40A(3) in the process of assessment. We, therefore, delete the addition of Rs. 17,90,571/- and ground no.1 is decided in favour of the assessee.*
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> *CIT vs Crescent Export Syndicate in ITA No. 202 of 2008 dated 30.7.2008 – Calcutta High Court*
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> *"It also appears that the purchases have been held to be genuine by the learned CIT(Appeal) but the learned CIT(Appeal) has invoked Section 40A(3) for payment exceeding 20,000/- since it is not made by crossed cheque or bank draft but by hearer cheques and has computed the payments falling under provisions to Section 40A(3) for 78,45,580/- and disallowed @20% thereon 15,69,116/-. It is also made clear that without the payment being made by bearer*

*cheque these goods could not have been procured and it would have hampered the supply of goods within the stipulated time. Therefore, the genuineness of the purchase has been accepted by the Id. CIT(Appeal) which has also not been disputed by the department as it appears from the order so passed by the learned Tribunal. It further appears from the assessment order that neither the Assessing Officer nor the CIT(Appeal) has disbelieved the genuineness of the transaction. There was no dispute that the purchases were genuine."*

*Anupam Teleservices vs ITO reported in (2014) 43 taxmann.com 199 (Guj)*

*""Section 40A(3) of the Income-tax Act, 1961, read with rule 600 of the Income-tax Rules, 1962-Business disallowance - Cash payment exceeding prescribed limits (Rule 6DD(j)-Assessment year 2006-07 - Assessee was working as an agent of Tata Tele Services Limited for distributing mobile cards and recharge vouchers - Principal company Tata insisted that cheque payment from assessee's co-operative bank would not do, since realization took longer time and such payments should be made only in cash in their bank account - If assessee would not make cash payment and make cheque payments alone, it would have received recharge vouchers delayed by 415 days which would severely affect its business operation - Assessee, therefore, made cash payment - Whether in view of above, no disallowance under section 40A (3) was to be made in respect of payment made to principal - Held, yes [ Paras 21 to 23J [ in favour of the assessee."*

*Sri Laxmi Satyanarayana Oil Mill vs CIT reported in (2014) 49 taxmann.com 363 (AP)*

*"Section 40A(3) of the Income-tax Act, 1961, read with Rule 600 of the Income-tax Rules, 1962-Business disallowance - Cash payment exceeding prescribed limit (Rule 600) - Assessee made certain payment of purchase of ground nut in cash exceeding prescribed limit - Assessee submitted that her made payment in cash because seller insisted on that and also gave incentives and discounts - Further, seller also issued certificate in support of this - Whether since assessee had placed proof of payment of consideration for its transaction to seller, and later admitted payment and there was no doubt about genuineness of payment, no disallowance could be made under section 40A(3) - Held, yes [ Para 23J [In favour of the assessee]" )*

4.6.3. Another argument advanced by the ld AR was that section 40A(3) of the Act uses the word 'any expenditure' which only pertains to single invoice and if the single invoice is less than Rs 20,000/-, then the provisions of section 40A(3) of the Act should not be invoked. In support of this proposition, he placed reliance on the co-ordinate bench of Cochin Tribunal in the case of Raja & Co vs DCIT in ITA No. 534/Coch/2011 dated 22.3.2013 , wherein the amended provisions of section 40A(3) of the Act w.e.f. 1.4.2009 together with the purpose of the said amendment as explained by CBDT was duly considered as under:-

*"The purpose of amendment was explained by the CBDT as under:-*

*"13.1 Clause Ca) of sub-section (3) of section 40A of the Income tax Act, 1961 provides that any expenditure incurred in respect of which payment is made in a sum exceeding Rs.20,000/- otherwise than by an account payee cheque drawn on a bank or by an account payee bank draft, shall not be allowed as a deduction. Clause (b) of sub-section (3) of section 40A also provides for deeming a payment as profits and gains of business or profession if the expenditure is incurred in a particular year but the payment is made in any subsequent year in*

*a sum exceeding Rs.20,000/- otherwise than by an account payee cheque or by an account payee bank draft. However, the provisions of this section are subject to exceptions as provided in rule 600 of the Income tax Rules, 1962.*

*13.2 Sub-section (3) of section 40A is an anti tax evasion measure. By requiring payments to be made by an account payee instrument, it is possible to verify the genuineness of the transaction. Thereby the risk of evasion is substantially mitigated. Field formations have reported that assessees tend to circumvent the provisions of sub-section (3) of section 40A by splitting a particular high value payment to one person into several cash payments, each below Rs.20,000/-. This splitting is also resorted to for payments made in the course of a single day. The courts have approved such splitting by interpreting the words "in a sum" used in the section to mean a single sum thereby applying the limit to each transaction. This interpretation is against the legislative intent and has, consequently, adversely affected the efficacy of this anti-abuse provision.*

*13.3 Therefore, the provisions of sub-section (3) of section 40A have been amended providing that the provisions of sub-section (3) shall also be attracted where the aggregate of payments made to a single party otherwise than by an account payee cheque drawn on a bank or account payee draft exceeds twenty thousand rupees in a day.*

*13.4 Applicability:- This amendment has been made applicable with effect from 1st April 2009 and shall accordingly apply for the assessment year 2009-2010 and subsequent years"*

*16. It is pertinent to note here that the rate of disallowance was 20% for the year under consideration, i.e., assessment year 2007-08. The Finance Act, 2007 enhanced the disallowance to 100% w.e.f. 1.4.2008. Again the amendment cited above was brought by Finance Act 2008 w.e.f. 1.4.2009. The Ld CIT(A) has taken the view that the amendment made by Finance Act, 2008 w.e.f.1.4.2009 shall apply to the year under consideration also, as the said amendment is clarificatory in nature. In our view, there are two major differences between the provisions as applicable to the year under consideration and the provisions amended by Finance Act, 2008.*

*(a) As per the provisions of sec. 40A(3) as applicable to the year under consideration, the payments of less than Rs.20,000/- made during the course of a day to a single person is not hit by the said provisions. However, as per the amended provisions, the said provisions shall apply only if the aggregate amount of payments made to single party in a day exceeds Rs.20,000/-. For example, if the value of a bill is Rs.1,00,000/-*
*and an assessee makes five payments of Rs.20,000/- each during the course of a day, then the said payments shall not be hit by the provisions of sec. 40A(3) as applicable to the year under consideration. However, under the amended provisions, they would be hit. However, if an assessee makes payment of Rs.20,000/- in a day and he so makes payments in five days, then such splitting up of payments would not be hit even by amended provisions.*

*(b) The rate of disallowance was 20% as per the provisions applicable to the year under consideration and the rate of disallowance is 100% as per the amended provisions.*

*The question that arises is whether the amendment brought out by Finance Act, 2008 w.e.f. 1.4.2009 can be considered as clarificatory in nature so that it shall have retrospective operation? As discussed earlier, the amendment only debars making several payments of less than or equal to Rs.20,000/- in a day to a single person, but does not debar making several payments of less than or equal to Rs.20,000/- on different dates to a single person, meaning thereby, the splitting up of payments during the course of a day to a single person is only debarred. Further, as stated earlier, there is significant variance in the quantum of disallowance to be made for violation of sec. 40A(3) of the Act. We notice that the Ld CIT(A) , though held that the amendment is retrospective in operation, however, has restricted to*

*disallowance only to 20% of the expenditure as per the old provisions., i.e., the Ld CIT(A) has applied the amended provisions only in part. In our view, an amendment cannot have retrospective operation in part. Since the amendment only debars splitting up of payments made to a person during the course of a day and did not debar splitting up in toto and since there is significant variance in the rate of disallowance, in our view, the amendment brought out by Finance Act, 2008 can only be considered as substantive in nature and shall have prospective operation only.*

*17. The CBDT circular (referred supra) refers to "a particular high value payment". The necessity to make payment to a party would arise only after conclusion of a transaction, say a "purchase" and the said deal would culminate into rising of a bill/invoice. Hence the term "high value payment" apparently refers to the concerned bill/invoice in respect of which the payment is required to be made, meaning thereby, the concerned bill/invoice should also be of a higher value. However, if the value of bill/invoice itself is less than Rs.20,000/-, it cannot be considered as a high value transaction in the context of sec. 40A(3) and hence the payment effected in respect of that kind of bill/invoice cannot be considered as high value payment. Accordingly, in our view, if the purchase is effected from a single person by way of several bills/invoices and if the value of each bill/invoice is less than Rs.20,000/-, then payments made to settle each bill/invoice would not be hit by the provisions of sec. 40A(3), as each bill/invoice has to be considered as a separate contract. The question of splitting up of the payment also does not arise in respect of such type of bills/invoices, as the value of each bill is less than Rs.20,000/-. In view of the above, we are unable to agree with the decision of Ld CIT(A) in holding that the purchases effected through several bills/invoices from a person shall also be hit by the provisions of sec. 40A(3) and accordingly set aside the said view of the tax authorities."*

4.6.4. Hence considering the totality of the facts and circumstances and going by the intention of introduction of section 40A(3) of the Act together with its amendments and decided judicial precedents relied upon hereinabove, we hold that no disallowance u/s 40A(3) of the Act is warranted in the facts and circumstances of the case. Accordingly, the Ground No. 3 raised by the assessee is allowed.

5. The Ground No. 4 raised by the assessee is general in nature and does not require any adjudication.

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

Order is pronounced in the open court on 25.11.2016.

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|---|---|
| Sd/- | Sd/- |
| (S.S. Viswanethra Ravi)<br>Judicial Member | (M. Balaganesh)<br>Accountant Member |

Dated : 25th November, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Excel Engineers, A-203, New Town Metro Plaza, Raharhat Main Road, Atghora, Kolkata-700 136
2. Respondent –JCIT(OSD)-51, Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.