

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C", NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER

	ITA No. 5170/Del/2014	
	A.Y. : 2006-07	
ACIT, CENTRAL CIRCLE-2, FARIDABAD	VS.	M/S MARIGOLD MERCHANDISE (P) LTD., A-503, ANSAL CHAMBERS-1, 3, BHIKAJI CAMA PLACE, NEW DELHI - 110 066 (PAN: AAECM0483E)
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Department by : Sh. Naveen Chandra, CIT(DR)  
Assessee by : Sh. Ashwani Taneja, Adv. & Sh.  
Shantanu Jain, Adv.

**ORDER**

**PER H.S. SIDHU, JM**

The Revenue has filed the present appeal against the impugned order dated 28/2/2013 passed by the Ld. Commissioner of Income Tax (Appeals)(Central), Jaipur, Rajasthan , New Delhi on the following grounds:-

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in deleting the addition made u/s. 40A(3) of the Act towards purchase of land holding these

cash payment falls under exceptional circumstances r.w.r.  
6DD of Income Tax Rules.

The appellant craves leave to add or amend any ground of appeal before the appeal is heard or disposed off.

2. The brief facts of the case are that the search operation was conducted on 17.9.2008 in Kamdhenu Group of cases. M/s Marigold Merchandise (P) Ltd-assessee company belongs to Basant Bansal sub-group. No surrender of undisclosed income was made in this group. Notice u/s. 153A of the Income Tax Act, 1961 (hereinafter referred as the Act) was issued on 09.3.2010 and served on the assessee. A return of income filed on 30.3.2010 by the assessee at declaring income of Rs. NIL. Notice u/s. 143(2) and 142(1) of the Act was issued on 20.5.2010. In response to the same, the assessee replied the notices and submitted that the payment towards purchase of a capital asset does not attract provisions of section 40A(3) as is the case of the assessee and relied upon the case law of ITAT, Delhi Bench in the case of Kanshi Ram Madan La. Vs ITO (1983) 3 ITD 290 (Delhi) wherein it has been held that the provisions of section 40A(3) are not applicable in the case of capital expenditure. Thereafter, the AO held that assessee has violated the provisions of Section 40A(3) of the Act with regard to the payment of Rs. 3 crore in cash. As such a sum of Rs. 60 lacs being 20% of Rs. 3 Crore was disallowed and added to the income of the assessee by completing the assessment on 28.12.2010 on total income of Rs. 60,00,000/- u/s. 143(3) r.w.s. 153A of the Act.

3. Aggrieved by the assessment order dated 28.12.2010, assessee filed appeal before the Ld. First Appellate Authority who has partly allowed the appeal of the assessee vide order dated 28.2.2013 and deleted the addition of Rs. 60,00,000/- made u/s. 40A(3) of the Act.

4. During the hearing, Ld. DR draw our attention towards the amendment of Rule 6DD(j) and stated that the amended section now provides that 20 per cent of cash expenditure made in violation of section 40A(3) will be disallowed in computing the total income of an assessee irrespective of cash payments made under exceptional or unavoidable circumstances or in cases of genuine difficulty to the payee or such other circumstances where cash payment is inevitable. In support of his contention, he filed the copy of the Instructions on the Amendment of Section 40A(3) read with Rule 6DD(j) of the Income Tax Act, 1961.

5. On the contrary, Ld. Counsel of the assessee has relied upon the order of the Ld. CIT(A). However, during the hearing assessee's counsel stated that the similar issue in dispute has already been adjudicated and decided in favour of the assessee by various decisions of the ITAT and the Hon'ble High Courts. In rebuttal, Ld. Counsel for the assessee stated that the amendment of Rule 40A(3) read with Rule 6DD(j) of Income Tax Act has been discussed by the different Benches of the ITAT including the Hon'ble High Court of Rajasthan. In this behalf, he relied upon the following decisions and filed the copies thereof:-

- i) Hon'ble High Court of Rajasthan decision dated 7.11.2006 in the case of Smt. Harshila Chordia vs. ITO reported in (2008) 298 ITR 349 (Rajasthan).
- ii) ITAT, 'B' Bench, Kolkata in the case of Sri Manoranjan Raha vs. ITO passed in ITA No. 1448/Kol/2011 AY 2008-09 vide order dated 18.11.2015.
- iii) ITAT, 'C' Bench, Kolkata in the case of Nirmal Kumar Das vs. ACIT passed in ITA No. 391/Del/2014 (AY 2010-11) vide order dated 11.12.2015.
- iv) ITAT, Delhi 'F' Bench in the case of Marigold Merchandise (P) Ltd. vs. DCIT reported in (2015) 55 taxmann.com 358 (Del. Trib).
- v) ITAT, SMC Bench, New Delhi in the case of Radhey Shyam Manchanda vs. ITO passed in ITA No. 5238/Del/2016 (ASY 2012-13) vide order dated 17.8.2017.

6. We have heard both the parties and perused the records available on record especially the impugned order. With regard to disallowance u/s. 40A(3) of the Income Tax Act is concerned, we find that assessee has purchased the land at Village Nangli Umarpur Distt. Gurgaon for a sum of Rs. 3.69 Cr. from the seller parties namely Sh. Pohap Singh, Sh.

Chet Singh, Sh. Chandra, Sh. Kishan, Smt. Vidhya, Smt. Jagwati, Smt. Veerwati and Smt. Lali. The purchase of agriculture land is evidenced through sale deed and the payment is also evidenced by way of the sale deed executed before the Sub Registrar. There is no dispute on the fact that the identity of the payee is proved, the genuineness of the transaction is proved and the source payment is also established in as much as such amount is found to be withdrawn from the HDFC bank account of the appellant company. The AO's case is that the provisions of sec. 40A(3) are of mandatory nature whereas the assessee- relying on the decision of the Hon'ble Jurisdictional Rajasthan High Court in the case of Harshee a Chordia vs. CIT supra has contended that when identity of the payee, genuineness of the transaction and source of payment is established then provision of section 40A(3) cannot be applied. The Hon'ble Rajasthan High Court while interpreting the provisions of Sec. 40A(3) in the case of Harshila Chordia vs, ITO supra has clearly held that when the genuineness of the transaction/payment is not disputed and the identity of the payee / received is established then such case will fall under the exceptional circumstances covered under-rule 6DD of IT Rules. The decision of the Hon'ble Jurisdictional ITAT in the case of the M/s Ace India Abodes Ltd. vs. ACIT CC-2, Jaipur in ITA no. 79/JP/2011 order dated 12.2.2011 and in the case of the M/s Shree Salaaar Overseas Pvt. Ltd.: vs. DCIT, Circ1e-2 in ITA no. 56/JP/2 10, order dated 21.2.2011 also supported the assessee's contention. The decision of the Jurisdictional High Court and the Jurisdictional ITAT are also of binding nature.

Therefore respectfully following the ratios of judgment of the Jurisdictional High Court as well as ITAT decisions, Ld. CIT(A) has rightly held that the assessee's case is found to be covered under the exceptional circumstances under rule 6DD of IT Rules. Accordingly, the addition made by the AO amounting to Rs. 60 lacs was rightly deleted by the Ld. CIT(A). Also we find no force in the arguments advanced by the Ld. DR, in view of the decision of the ITAT, 'B' Bench, Kolkata vide Order dated 18.11.2015 passed in ITA No. 1448/Kol/2011 AY 2008-09 in the case of Sri Manoranjan Raha vs. ITO wherein the Tribunal has held as under:-

*"4.3 We have heard the rival submissions and perused the materials available on record. We find that the payments made by cash in violation of Section 40A(3) of the Act have been duly acknowledged by the recipient Sh. Amit Dutta who had deposed before the Ld. AO and confirmed the fact of receipt of monies in cash. Hence the genuinity of payments made by the assessee stands clearly established beyond doubt. Even for the amounts enhanced by Ld. CIT(A) in the sum of Rs. 54,01,473/-, the genuineness of the payments and the necessity to incur the said expenditure for the purpose of business of the assesseee was never disputed by the Ld. CIT(A). We hold that since the genuinity of the payments made to the parties is*

*not doubted by the revenue, the provisions of section 40A(3) could not be made applicable to the facts of the instant case. It will be pertinent to go into the intention behind introduction of provisions of section 40A(3) of the Act at this juncture. We find that the said provision was inserted by Finance Act 1968 with the object of curbing expenditure in cash and to counter tax evasion. The CBDT Circular No. 6P dated 6.7.1968 reiterates this view that "this provision is designed to counter evasion of a tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the department as to the identity of the payee and reasonableness of the payment."*

*4.4. In this regard, it is pertinent to get into the following decisions on the impugned subject:-*

*Attar Singh Gurmukh Singh vs. ITO reported in (1991) 191 ITR 667 (SC)*

*"Section 40A(3) of the Income-tax Act, 1961, which provides that expenditure in excess of Rs.2,500 (Rs.10,000/- after the 1987 amendment) would be allowed to be deducted only if made by a crossed cheque*

*or crossed bank draft (except in specified cases) is not arbitrary and does not amount to a restriction on the fundamental right to carry on business. If read together with Rule 6DD of the Income-tax Rules, 1962, it will be clear that the provisions are not intended to restrict business activities. There is no restriction on the assessee in his trading activities. Section 40A(3) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted upon to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of income from undisclosed sources. The terms of section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD*



*provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and rule 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions."*

*CIT vs CPL Tannery reported in (2009) 318ITR 179 (Cal)*

*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.*

*CIT vs Crescent Export Syndicate in ITA No. 202 of 2008 dated 30.7.2008 - Jurisdictional High Court decision*

*"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 Rs.20,000/- since it is not made by crossed cheque or bank draft but by bearer cheques and has computed the payments falling under provisions to Section 40A(3) for Rs.78,45,580/- and disallowed @20% thereon Rs.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 Tete Services vs ITO in (2014) 43 Taxmann.com 199 (Guj)*

*"Section 40A( 3) of the Income-tax Act, 1961, read with rule 6DD 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 4/5 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 23] [in favour of the assessee]"*

*Sri Laxmi Satvanaravana Oil Mill vs Cft reported in (2014) 49 taxmann.com 363 (Andhrapradesh High Court)*

*"Section 40A(3) of the Income-tax Act, 1961, read with Rule 6DD of the Income-tax Rules, 1962 - Business disallowance - Cash payment*

*exceeding prescribed limit (Rule 6DD) - 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 23]*

*[In favour of the assessee]"*

*CIT vs Smt. Shelly Passi reported in (2013) 350 ITR 227 (P&H)*

*In this case the court upheld the view of the tribunal in not applying section 40A( 3) of the Act to the cash payments when ultimately, such amounts were deposited in the bank by the payee.*

*4.5 It is pertinent to note that the primary object of enacting section 40A(3) was two fold, firstly, putting a check on trading transactions with a mind to evade the liability to tax on income earned out of such transaction and, secondly, to inculcate the banking habits amongst the business community. Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequence, which were to befall on account of non- observation of section 40A(3) must have nexus to the failure of such object. Therefore, the genuineness of the transactions it being free from vice of any device of evasion of tax is relevant consideration.*

*4.6. The Hon'ble Apex Court in the case of CIT vs Swastik Roadways reported in (2004) 3 SCC 640 had held that the consequences of non-compliance of Madhyapradesh Sales Tax Act , which were intended to check the evasion and avoidance of sales tax were significantly harsh. The court while upholding the constitutional validity negated the existence of a mens rea as a condition necessary for levy of penalty for non-compliance with such technical provisions required held that "in the consequence to follow there must be nexus between the consequence that befall for non-compliance with such provisions intended for*

*preventing the tax evasion with the object of provision before the consequence can be inflicted upon the defaulter." The Supreme Court has opined that the existence of nexus between the tax evasion by the owner of the goods and the failure of C & F agent to furnish information required by the Commissioner is implicit in section 57(2) and the assessing authority concerned has to necessarily record a finding to this effect before levying penalty u/s. 57(2).*

*Though in the instant case, the issue involved is not with regard to the levy of penalty, but the requirement of law to be followed by the assessee was of a technical nature as was in the case of Swastik Roadways (3 SCC 640) and the consequence to fall for failure to observe such norms in the present case are much higher than which were prescribed under the Madhya Pradesh Sales Tax Act. Apparently, it is a relevant consideration for the assessing authority under the Income Tax Act that before invoking the provisions of section 40A(3) in the light of Rule 6DD as clarified by the Circular of the CBDT that whether the failure on the part of the assessee in adhering to requirement of provisions of section 40A(3) has any such nexus which defeats the object of provision so as to invite such a consequence. We hold that the purpose of section 40A(3) is only preventive and to check evasion of tax and flow of unaccounted money or to check transactions which are not genuine and may be put as camouflage to*

*evade tax by showing fictitious or false transaction. Admittedly, this is not the case in the facts of the assessee herein. The payments made in cash to Shri. Amit Dutta had been duly acknowledged by him in an independent deposition given by him before the Learned AO which was admittedly taken behind the back of the assessee. It is also pertinent to note that the Hon'ble Rajasthan High Court in the case of Smt. Harshila Chordia vs ITO reported in (2008) 298 ITR 349 (Raj) had held that the exceptions contained in Rule 6DD of Income Tax Rules are not exhaustive and that the said rule must be interpreted liberally.*

*4.7. The assessee has also given the income tax assessment particulars of Amit Dutta before the Learned AO. Moreover, the Learned AO himself had taken deposition from Sri Amit Dutta u/s 131 of the Act wherein he had confirmed the receipt of monies in cash as well as by cheque / DD from the assessee. Hence the acknowledgement of the payments made by the assessee by the payee is proved beyond doubt. The assessee had also stated that the payee had duly included these payments as his receipts in his returns.*

*4.8. We are unable to buy the argument of the Learned AR that the assessee had made payment to his agent Mr. Arnit Dutta for purchase of sim cards and others and hence would fall under the exception provided in Rule 6DD(k) of the IT Rules. For the sake of convenience, Rule 6DD(k) is reproduced herein below:-*

*"Rule 6DD(k) of the IT Rules 1962 6DD. No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to the profits and gains of business or profession under sub-section (3A) of section 40A 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 the cases and circumstances specified hereunder, namely:-*

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*(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 said rule says that if the payment is made by a person to his agent who is required to make payment in cash for goods and services on behalf of such person: Admittedly, Shri.Arnit Dutta is only the agent of Hutchison Essar Ltd and not the assessee as could be seen very clearly from the Associate Distributor Agreement entered into by the assessee which is on records before us and before the lower authorities. Hence*



*the payment made by the assessee to Shri.Arnit Dutta would not fall under the exception clause of Rule 6DD(k).*

*4.9. We find that one of the grounds raised by the assessee is violation of principles of natural justice on the part of the Learned CIT(A) to enhance the assessment without giving enhancement notice to the assessee. But from the order of the Learned CITA, it is specifically mentioned that the assessee was given due opportunity and show cause notice for enhancement of assessment by Rs. 54,01,473/- for making further additions on account of section 40A(3) of the Act. We find that the assessee had not come on any affidavit before us refuting this finding. Hence the enhancement made by the Learned AO cannot be faulted with on violation of principles of natural justice.*

*4.10. In view of the aforesaid facts and circumstances and respectfully following the judicial precedents relied upon hereinabove, we have no hesitation in deleting the addition made in the sum of Rs. 60,50,8901- and 54,01,473/- u/s 40A(3) of the Act. Accordingly, the grounds raised by the assessee in this regard are allowed.*

*5. In the result, the appeal of the assessee is allowed.”*

7. After perusing the aforesaid decision of the ITAT, Kolkata, we are of the considered view that the issue in dispute is also squarely covered by the aforesaid decision, because the facts and circumstances of the present

case are exactly similar and identical to the aforesaid case law. Therefore, respectfully following the aforesaid decision dated 18.11.2015 of the ITAT, 'B' Bench, Kolkata passed in ITA No. 1448/Kol/2011 AY 2008-09 in the case of Sri Manoranjan Raha vs. ITO, the order of the Ld. CIT(A) is upheld and grounds raised by the Revenue stand rejected.

7.1 We further find that assessee has filed a copy of Application under Rule 27 of Appellate Tribunal Rules, 1963 dated 21.6.2017, but at the time of hearing, he has not pressed the same, hence, the same is dismissed as such.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 11/09/2017.

**Sd/-**

**(L.P. SAHU)  
ACCOUNTANT MEMBER**

**Sd/-**

**[H.S. SIDHU]  
JUDICIAL MEMBER**

*Date 11/09/2017*

**"SRBHATNAGAR"**

**Copy forwarded to: -**

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches