

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**Before Sh. Bhavnesh Saini, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 563/Del./2016 : Asstt. Year : 2010-11**

J. D. Wines, C/o R.K. Soota, Advocate, H.No. 11, New Colony, Gurgaon, Haryana	Vs	Addl. Commissioner of Income Tax, Range-1, Gurgaon, Haryana
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAGFJ7067A</b>		

**Assessee by : Sh. Vinod Kr. Garg, Adv. &  
Sh. Sunil Gupta, Adv.**

**Revenue by : Sh. Deepak Garg, Sr. DR**

**Date of Hearing: 16.10.2019**

**Date of Pronouncement: 30.10.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-1, Gurgaon dated 04.12.2015.

2. Following grounds have been raised by the assessee:

*"1. That the order of Ld. CIT(A) is bad in law in the facts and circumstances of the case.*

*2.(a) That the Ld. CIT(A) is not justified in confirming the addition of Rs. 15,73,450/- (847000+726450/-) on account of excise duty payable to Excise department u/s 43B, whereas no excise duty is payable and outstanding in balance sheet and all the excise duty has been paid as claimed.*

*(b) Without prejudice to above the appellant disputes that the quantum of addition confirmed is on higher side.*

*3.(a) That the Ld. CIT(A) is not justified in confirming the addition of Rs.9227520/- on account of purchases u/s 40A(3) of the Income Tax Act 1961 being cash payments to three parties whereas the payments were genuine and bona fide and made at the insistence of the creditors due to business expediency and are out of the sweep of section as per proviso to Sec 40A(3).*

*(b) Without prejudice to above the appellant disputes that the quantum of addition confirmed is on higher side.*

*4.(a) That the Id CIT(A) is not justified in dismissing the ground of appeal regarding disallowance of depreciation of Rs.71850/- on Motor Lorry due to difference in cost price amounting to Rs.239500 on motor lorry by holding that no arguments or explanation was given at the appellate stage whereas the arguments and explanations were duly given in written submissions and it is explained that the difference in price is due to insurance and registration charges, which are in addition to cost of lorry.*

*(b) Without prejudice to above the appellant disputes that the quantum of addition confirmed is on higher side."*

**Difference in License Fee- Addition u/s 43B:**

3. As per the P&L account, the assessee has shown the payment of license fees as under:

"License Fees L-1	Rs.25,00,000/-
License Fees L-2/L-14	Rs.74,32,10,400/-"

4. The Assessing Officer called for information u/s 133(6) of the Income Tax Act from the Excise department dated 12.02.2013 from the office of Deputy/Asstt. Excise & Taxation Officer, Gurgaon.

Sl. No.	Amount claimed in P&L a/c	Amount as per Taxation Commissioner, Gurgaon
1.	74,32,10,400	74,23,63,480
		8,46,920

5. On receipt of information, the Assessing Officer held that the assessee could not reconcile the difference of Rs.8,47,000/- on account of shop at Galaria Market and Rs. 7,26,450/- on account of Nathpur vend. The Assessing Officer held that the assessee has accepted the other difference of Rs.7,26,450/-, which has been duly paid on 12.02.2013 as per copies of challans furnished. The Assessing Officer conclusively held that the assessee has failed to furnish any reconciliation/ justification towards difference of license fee on paid of Rs.8,47,000/- and has not paid Rs. 7,26,450/- before filing of the Income Tax Return. Since, statutory payments have not been paid in time, provisions of Section 43B were invoked and addition of Rs. 15,73,450/- is made to the income of the assessee.

6. The Id. CIT (A) confirmed the addition on the grounds that in respect of Nathpur vend, the assessee paid license fee only on 12.02.2013. It was held that it is also a matter of record that Excise and Taxation Department of Gurgaon has been continuously claiming that the license fees as mentioned above have not been paid before the close of the Financial Year relevant for A.Y. 2010-11. Hence, it was held that the A.O was justified in invoking revisions of Section 43B.

7. Before us, during the arguments, the Id. AR submitted that there was no dispute about the payments of the Excise duty and all the payments made towards Excise duty has been duly reflected in the P&L

account. He argued that the amount claimed and the P&L account was 743210400 and no amount has been claimed as payable to Excise authorities. He argued that since the payments made only have been claimed in the P&L account, no disallowance under Section 43B are applicable. Regarding the difference of Rs. 8,47,000/- of Galaria Market, Gurgaon, the amounts has been reconciled and no payment was made to Excise authorities. Further, regarding the payment of Rs. 7,26,450/- on account of Nathpur vend, this amount has been paid in protest by the assessee as per the demand made by the Excise authorities otherwise the assessee would stand loosing the opportunity of applying the tender for continuation of the license of the vend.

8. On the other, the Id. DR vehemently relied on the orders of the revenue.

9. Heard the arguments of both the parties and perused the material available on record. The undisputed facts are as under:

- Letter dated 10.01.2013 confirmed short deposit of Rs.7,26,450/-
- Letter dated 18.02.2013 confirmed the short deposit of Rs.8,47,000/-
- Letter dated 18.02.2013 confirmed total deposit of Rs.74,23,63,400/-
- Amount claimed in P&L a/c of Rs.74,32,10,400
- The difference is about Rs.8,47,000/-
- As per the letter dated 11.05.2010, the Excise authorities confirmed the payment of Rs. 74,32,10,400/-
- There was no outstanding balance payable as per the balance sheet.

10. The Provisions of Section 43B reads as under:  
Certain deductions to be only on the actual payment.

*"43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable<sup>7</sup> under this Act in respect of—*

*10[(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]*

*(b) any sum payable by the assessee as an employer by way of <sup>11</sup>contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, <sup>12</sup>[or]*

*12a[(c) any sum referred to in clause (ii) of sub-section (1) of section 36,] <sup>13</sup>[or].....*

*[Provided that nothing contained in this section shall apply in relation to any sum [\*\*\*] which is actually paid<sup>21</sup> by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.*

*Explanation [1].—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]*

*[Explanation 2.—For the purposes of clause (a), as in force at all material times, "any sum payable" means a sum for which the assessee incurred liability in the previous year even*

*though such sum might not have been payable within that year under the relevant law.]*

*[Explanation 3].—For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) [or clause (d)] of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]”*

11. In the reading of the provisions of the Act, the deduction on account of Excise duty is allowable only on the basis of actual payment. From the records, it can be gauged that the assessee has paid an amount of Rs. 74,32,10,400/- and claimed the same in the P&L account. This fact of payment of Rs.74,32,10,400/- has been confirmed by the Excise authorities vide letter dated 11.05.2010. The balance sheet does not reflect any outstanding payments by the assessee. Hence, keeping in view, the entirety of the fact, we hereby allow the payment made by the assessee on account of Excise duty as confirmed by the Excise authorities. The appeal of the assessee on this ground is allowed.

12. The Assessing Officer has made an addition of Rs. 92,27,520/- as per the provisions of section 40A(3) on account of cash payments to three parties namely,

1. M/s Skol Breweries Ltd.
2. M/s Ashoka Distillers & Chemicals Pvt. Ltd.
3. M/s Allied Blenders & Distillers Pvt. Ltd.

13. The Assessing Officer held that the case of the assessee is not covered under rule 6DD(j) of IT Rules. The exceptions laid out specially do not apply to the facts of the case. The Id. CIT (A) confirmed the addition

on the grounds that the assessee has not explained as to why the payments were made in cash.

14. Before us, the Id. AR argued that the amounts have been paid in cash against the purchases owing to the urgency, contingency of the business and request of the sales parties. He relied on various judgments especially on the judgment of Hari Chand Virender Paul Vs CIT 140 ITR 149 (P&H) and order of the ITAT Delhi in the case of KGL Networks Pvt. Ltd. in ITA No. 301/Del/2018 dated 02.07.2018. The Id. DR vehemently relied on the orders of the revenue authorities and argued that Rule 6DD(j) is no more applicable to the facts of the case for the assessment years in question.

15. Heard the arguments of both the parties and perused the material available on record.

16. We find that on the facts of the case, the total purchases made by assessee in cash are as under:

<i>Sl. No.</i>	<i>Name</i>	<i>Total purchases</i>	<i>Purchases in cash</i>
1.	<i>Skol Breweries Ltd.</i>	<i>4,30,80,420</i>	<i>16,00,000</i>
2.	<i>Ashoka Distillers &amp; Chemicals Pvt. Ltd.</i>	<i>2,40,02,620</i>	<i>15,00,000</i>
3.	<i>Allied Blenders &amp; Distillers Pvt. Ltd.</i>	<i>5,67,96,570</i>	<i>61,27,520</i>

17. We find that the percentage of cash purchases from the parties is quite low compare to the total purchases. It was argued that the payment of the amount in cash was necessitated by the request of the sales parties and it is also on record that both the parties namely the assessee and the Distillers have entered these transactions in their respective returns. It was on record that these payments have to be made in order to meet the deposit of Excise duty by the Distilleries. We have also gone through the

provisions of Rule 6DD(j) pertaining to this year and the change of position from the assessment year 2008 onwards. The Rule in its present form does not include any such circumstances like business exigency or exceptional circumstances, under which, such cash payments can be made as a business expenditure under section 40A(3) of the I.T. Act, 1961.

18. In this regard, it is pertinent to observe the following decision on the impugned subject duly referred in the order of the KGL Networks Pvt. Ltd. (supra) which are as under:

"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 CIT reported in (2014) 49 taxmann.com 363 (Andhra Pradesh 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 Madhya Pradesh 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 noncompliance with such technical provisions required held that "in the consequence to follow there must be nexus between the consequence that befall for noncompliance 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 as 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 subsection (3) of section 40A shall be made and no payment shall be deemed to the profits and gains of business or profession under

subsection (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:- .....

(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.”

19. The provisions of Section 40A(3) are as under:

*"Section 40A(3).....*

*(3) 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, [or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed], exceeds ten thousand rupees,] no deduction shall be allowed in respect of such expenditure.*

*(3A) Where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed]], the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceeds [ten] thousand rupees:*

*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, [or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed], exceeds ten 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 :]**”*

20. Having considered the submissions and perused the entire facts and circumstances of the case, even though there is an amendment in Rule 6DD of I.T. Rules as is noted by the Ld. CIT(A), but in Section 40A(3) of the I.T. Act, 1961 itself, an exception is provided on account of nature and extent of banking facilities available, consideration of business expediency and other relevant factors. It is not in dispute that assessee-company was engaged in the business of liquor trading and obtain supplies from the breweries. The amounts in question have been tabulated above showing the extent of amounts paid in cash. These payments are made to the distillers and breweries. The nature of business of assessed shown the expediency of payment of cash to meet the requirements of the suppliers for payment of Excise duty and clearing of cheques by the suppliers. The authorities below have not doubted the identity of the payee and the genuineness of the transaction in the matter. The source of payment is also not been doubted by the authorities below. Hence, we accordingly, set aside the orders of the authorities below and delete the addition made u/s 40A(3).

### **Disallowance of Depreciation - Motor Lorry**

21. We find that the Assessing Officer and the Id. CIT (A) have disallowed the claim as the assessee could not produce any bills for allowance of such expenditure. Even before us, the assessee did not produce any evidence in support of their claim. Hence, we decline to interfere with the orders of the revenue on this ground. Appeal of the assessee on this ground is dismissed.



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

Order Pronounced in the Open Court on 30/10/2019.

Sd/-

**(Bhavnes Saini)**  
**Judicial Member**

**Dated: 30/10/2019**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**