IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

आयकर अपील सं. / ITA No.1883/PUN/2018
निर्धारण वर्ष / Assessment Year : 2013-14

Suresh Chunnilal Sharma, Prayag Kunj, Opp. Balaji Mandir, Subhash Road, Parbhani-431401 Maharashtra PAN : ABIPS2977B	**Vs.**	ITO, Ward-Parbhani, Parbhani
(Appellant)		(Respondent)

Appellant by	Shri Pramod Shingte
Respondent by	Shri Sudhendu Das
Date of hearing	12-02-2021
Date of pronouncement	16-02-2021

आदेश / ORDER

This appeal by the assessee is directed against the order passed by the CIT(A)-1, Aurangabad on 14-09-2018 in relation to the assessment year 2013-14.

2. The first issue raised is against the confirmation of disallowance of Rs.9,52,000/- made by the Assessing Officer (AO) u/s.40A(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act').

3. Succinctly, the factual panorama of the case is that the assessee is engaged in the business of land plotting in addition

to earning income from house property and dividend. A return was filed declaring total income of Rs.9,17,560/-. During the course of assessment proceedings, it was observed that the assessee purchased Plot nos. 164 and 165 admeasuring 370.20 sq. mtrs for a consideration of Rs.9,52,000/-. Out of this, an area of 183.17 sq. mtrs. was sold for a consideration of Rs.6,24,000/- giving gross profit of Rs.1,19,664/-. On a perusal of the Purchase deed of Plot nos. 164 and 165, the AO observed that the plots were purchased from one Mr. Devikinandan Hariprasad Agrawal for a consideration of Rs.9,52,000/- in cash. The plots were admittedly stock in trade of the assessee. On being called upon to explain as to why disallowance u/s.40A(3) of the Act be not made for equal sum, the assessee failed to furnish any satisfactory explanation. Considering the fact that the assessee was engaged in the land plotting business and had purchased the plots as stock-in-trade, the AO made disallowance of Rs.9,52,000/- u/s.40A(3) of the Act. During the course of the first appellate proceedings, the assessee contended that Mr. Devikinandan Hariprasad Agrawal, the seller of the plots, was a senior citizen and it was at his insistence that the payment was made in cash. In support of

this contention, an affidavit from Mr. Devikinandan Hariprasad Agrawal was also filed. This additional evidence was sent back to the AO, who submitted a remand report dated 08-03-2015 which has been reproduced at page 5 onwards of the impugned order. In the remand proceedings, the AO required the assessee to prove that his case was covered under Rule 6DD of the Income-tax Rules, 1962 (hereinafter called `the Rules'). In response, the assessee submitted that the cash payment was made due to urgent requirements of the seller, who was a senior citizen and it was not possible for him to go frequently to the bank. It was also emphasized that the transactions were genuine. The AO issued summons to the seller and recorded his statement on 07-03-2018. In response to query no.7, Mr. Devikinandan Hariprasad Agrawal admitted of having four accounts in three banks, namely, Bank of Baroda, Mahesh Urban Cooperative Bank, Parbhani, Peoples Cooperative Bank, Hingoli (CC account and CA account). He, however maintained that he insisted for cash payment. The AO also examined the bank statement of Mr. Devikinandan Hariprasad Agrawal and found that there were several transactions of cash payments and cash withdrawals along with transactions through cheques. He,

therefore, refused to accept the assessee's contention of the case falling under Rule 6DD. The ld. CIT(A) echoed the view taken by the AO on this score.

4. I have heard both the sides through Virtual Court and gone through the relevant material on record. The assessee purchased two plots, admittedly as stock in trade, worth Rs.9,52,000/- in cash. Even some area out of such plots was sold during the year generating business income therefrom. The cash purchases, *ex-facie,* violated the provisions of section 40A(3) of the Act. The whole case of the assessee is founded on the premise that it was a genuine business transaction between two *bona fide* parties, who had promptly depicted the transaction in their respective income-tax returns and hence no disallowance u/s. 40A(3) of the Act was warranted.

5. In order to appreciate the contention, it would be worthwhile to have a glance at section 40A(3) of the Act, which, at the material time, provided that: "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 …., exceeds ten thousand rupees, no deduction shall be allowed in

respect of such expenditure". The assessee patently violated the prescription of section 40A(3) by incurring expenditure of Rs.9,52,000/- on purchase of stock in trade otherwise than by a account payee cheque etc. Going with the mandate of the sub-section (3) of section 40A, disallowance is required in respect of such expenditure.

6. Now I need to ascertain if the assessee can get any succour under the first proviso to section 40A(3A), which carves out exceptions to the main provision of sub-section (3) as well and mandates: `that no disallowance shall be made … where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque …. 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."* On going through the language of the proviso, it becomes explicitly clear that a window has been given for non-disallowance even when the payment exceeding Rs.10,000/- is made otherwise than through account payee cheque etc. in the cases and circumstances *as may be prescribed* having regard to the nature and extent of

bank facilities available, considerations of business expediency and other relevant factors. Pursuant to section 295 of the Act, the CBDT has prescribed the `cases and circumstances' in which a payment or aggregate of payments exceeding ten thousand rupees may be made to a person in a day, otherwise than by an account payee cheque etc. under rule 6DD without inviting wrath of section 40A(3). This rule opens by stating that: `No disallowance under sub-section (3) of section 40A shall be made…. 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… , exceeds ten thousand rupees *in the cases and circumstances specified hereunder, namely*:-'. Thereafter clauses (a) to (l) provide for such cases and circumstances. The case of the assessee admittedly does not fall in any of the clauses.

7. The ld. AR has canvassed a view that even though the case does not fall under any of the specific clauses of rule 6DD, the disallowance should be deleted as it was a genuine business transaction covered within the words `business expediency' as used in the proviso to section 40A(3A).

8. On a conjoint reading of section 40A(3) read with the first proviso to section 40A(3A) on one hand and rule 6DD on the other, it is manifest that the proviso provides for the cushion from disallowance in the cases and the circumstances as may be prescribed having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors. The Board has enlisted such cases and circumstances in different clauses of rule 6DD having regard, *inter alia,* to the `business expediency' in an exhaustive manner, which obviously does not cover a case of *per se* genuine business transaction. If the Parliament had intended to bring all the genuine business transactions out of the purview of disallowance, then it would not have used the words '*in such cases and under such circumstances as may be prescribed'*. The words `*having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors'* are in the nature of guide to the rule making authority for prescribing the cases and circumstances not warranting disallowance. Once the cases and circumstances have been exhaustively prescribed in rule 6DD, one cannot go back

to section 40A(3) for seeking shelter under the words `business expediency' used in it and *suo motu* invent any other case or circumstance requiring exclusion from the rigour of section 40A(3). The situation would have been different if the proviso to section 40A(3A) had mandated exclusion itself, *inter alia,* on the ground of business expediency rather than requiring the rule making authority to prescribe cases and circumstances falling within the exception clause.

9. At this juncture, it is relevant to note that the CBDT cannot transgress the corresponding section while formulating the relevant rules. In other words, the Rules cannot provide for fresh or additional obligations, which are absent in the enabling provision under the Act. At the same time, it is equally essential to comprehend that there is a difference between two situations, viz., one where the rules provide certain fresh and additional disabilities for which there is no sanction in the parent section and two, where the rules provide the disabilities which are within the scope of the corresponding enabling section and not *de hors* the same. What is crucial to note is that prescription of rule 6DD

falls under the second situation, which cannot be expanded or diluted by the Tribunal. The sum and substance of the above is that only when a case falls within any of the specific clauses of Rule 6DD, that it would qualify for immunity from the disallowance.

10. The ld. AR tried to invoke clause (j) for seeking relief, which, at the material time, provided: "Where the payment was required to be made on a date on which banks were closed either on account of holiday or strike". The assessee, has neither demonstrated nor was it a case before the authorities below that there was a bank holiday or the bank was closed because of strike on the date on which the transaction took place.

11. The ld. AR heavily accentuated on the genuineness of transaction towards pitching a case of non-disallowance. In my view, this argument does not hold water. Section 40A(3) of the Act has been inserted to regulate genuine business transactions through banking channel rather than permitting them in cash. If a transaction itself is not genuine, the same will not fall for consideration under this provision and will warrant full disallowance at the

threshold rather than calling for disallowance under section 40A(3) of the Act only to the extent of cash payment in excess of Rs.10,000/- on a day. It is only where a genuine transaction has been recorded but in violation of section 40A(3) by making cash payments etc. that the rigour of the section is triggered to make disallowance u/s.40A(3). This can be understood with the help of an example. If a genuine business expenditure of Rs.50,000/- is incurred, out of which Rs.10,000/- each has been paid in cash on two different dates and Rs.30,000/- in cash on a third day. Section 40A(3) will be attracted to make disallowance of Rs.30,000/- only on the third occasion. Per contra, if such expenditure of Rs.50,000/- is found to be bogus, the entire amount will be disallowed without even entering into the realm of section 40A(3) of the Act.

12. Both the rival sides have relied on certain decisions fortifying their respective points of view. *Por una parte*, certain High Courts including the Hon'ble Gujarat High Court in *Anupam Tele Services Vs. ITO (2014) 366 ITR 122 (Guj.)* and the Hon'ble Rajasthan High Court in

Harshila Chordia Vs. ITO (2008) 298 ITR 349 (Raj.) have deleted the disallowance in the cases of genuine business transactions, *por otra parte*, certain other High Courts including the Hon'ble Bombay High Court in *Madhav Govind Dulshete Vs. ITO (2018) 259 Taxman 949 (Bom.)*, the Hon'ble Madras High Court in *Vaduganathan Talkies and others Vs. ITO (2020) 428 ITR 224 (Mad.),* the Hon'ble Karnataka High Court in *Nam Estates Pvt. Ltd. Vs. ITO (2020) 428 ITR 186 (Kar.)* and the Hon'ble Calcutta High Court in *Bagmari Tea Company Ltd. Vs. CIT (2001) 251 ITR 640 (Cal.)* have confirmed the disallowance where the payment was made in cash exceeding the stipulated amount notwithstanding the genuineness of the transaction.

13. Let me consider the judgment of the Hon'ble jurisdictional High Court in *Madhav Govind Dulshete (supra)* a little more elaborately. The assessee therein was engaged in the business of sale of Kerosene which was purchased from notified dealers. The assessee made purchases of Kerosene from certain companies. Some of the payments were made in cash while others were in cheque. The AO made disallowance by invoking section 40A(3) in respect of cash payments

exceeding the limit by noticing that both the assessee and seller had banking facilities. The CIT(A) affirmed the assessment order. The Tribunal echoed the AO's view by finding that both the buyer and sellers had bank accounts. The Hon'ble High Court countenanced the view of the Tribunal sustaining the disallowance thereby repelling the assessee's contention of a genuine business transaction as a ground for not making disallowance u/s 40A(3) of the Act.

14. Turning to the facts of the instant case, it is found as an admitted position that the assessee as well as the seller of the plots had bank accounts at the material time and still the transaction was carried out in violation of section 40A(3) without bringing the case in any of the specific clauses of Rule 6DD.

15. On an overview of the view canvassed by various Hon'ble High Courts on the point - some deleting the disallowance on the basis of the genuineness of the transactions while others sustaining the disallowance - what matters for the Tribunal is to follow the binding precedent, being, the judgment of Hon'ble jurisdictional High Court. That being the position, the Pune Tribunal is bound by the judgment of the Hon'ble jurisdictional

High Court in *Madhav Govind Dulshete (supra)* sustaining the disallowance in case of cash payments exceeding the stipulated limit notwithstanding the fact that the transactions were genuine and the parties were identifiable. Respectfully following the judgment, I uphold the disallowance sustained in the first appeal. This ground fails.

16. The only other ground in this appeal is against the confirmation of disallowance of Rs.7,36,934/- made u/s.14A read with Rule 8D.

17. The factual matrix of the ground is that the assessee earned exempt income of Rs.9,23,194/- as his share of profit from various firms and also dividend of Rs.69,179/- which was claimed as exempt u/s.10(2A) and 10(34) respectively. In the absence of the assessee offering any disallowance u/s.14A, the AO called for the reasons. The assessee furnished explanation. The AO, by means of elaborate reasoning running into 4 pages, held that the disallowance u/s.14A read with Rule 8D was called for. The amount of disallowance was computed at Rs.7,36,934/- comprising of interest of Rs.6,45,536/- and half percent of average investments at Rs.91,398/-. The ld. CIT(A) sustained the disallowance.

18. I have heard the rival submissions and gone through the relevant material on record. The only issue raised by the ld. AR is *qua* the interest disallowance of Rs.6,45,536/-and not the other part. The ld. AR contended that the assessee had sufficient interest free capital for the purpose of making investment in the firms and companies yielding exempt income and hence, no disallowance should be made. In support of such contention, he invited my attention towards page 28 of the paper book on which some calculation has been made showing interest bearing funds and interest free funds available with the assessee. It is observed that the authorities below did not accept the contention, in principle, by opining that interest free funds available with the assessee could not be deemed to have been utilised for making investments in sources yielding exempt income. In this regard, it is noticed that the Hon'ble Supreme Court in *CIT (LTU) Vs. Reliance Industries Limited (2019) 410 ITR 466 (SC)* has approved the view that where interest free funds available with the assessee were sufficient to meet its investment and at the same time loan was raised, it can be presumed that the investments were made from interest free funds and hence, no disallowance of interest should be made to

that extent. In view of the above decision, I deem it appropriate to send the matter back to the file of AO for examining the assessee's contention about the availability of interest free funds available with him and then decide the amount of interest disallowable u/s.14A. Insofar as the remaining amount of Rs.91,398/-, being, one half percent of average value of investment is concerned, the same is held to be properly disallowed.

19. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the Open Court on 16th February, 2021.

Sd/-
(R.S.SYAL)
उपाध्यक्ष/ VICE PRESIDENT

पुणे Pune; दिनांक Dated : 16th February, 2021
Satish

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
   The CIT (Appeals)-1, Aurangabad
4. The Pr. CIT-1, Aurangabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**SMC**" /
   DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy // Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	12-02-2021	Sr.PS
2.	Draft placed before author	16-02-2021	Sr.PS
3.	Draft proposed & placed before the second member	--	JM
4.	Draft discussed/approved by Second Member.	--	JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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