IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR

BEFORE SHRI MUKUL K. SHRAWAT, JUDICIAL MEMBER AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER.

ITA No. 446/Nag/2013
Assessment Year : 2009-10.

M/s Shree B & B Paradise Land Developers, Nagpur **PAN ABJFS6683H.** Appellant.	Vs.	The Income-tax Officer, Ward-6(3), Nagpur. Respondent.

ITA No. 412/Nag/2013
Assessment Year : 2009-10.

The Income-tax Officer, Ward-6(3), Nagpur. Appellant.	Vs.	M/s Shree B & B Paradise Land Developers, Nagpur. Respondent.

C.O. 01/Nag/2014
(Arising out of ITA No.446/Nag/2013)
Assessment Year : 2009-10.

M/s Shree B & B Paradise Land, Developers, Nagpur. Cross Objector.	Vs.	The Income-tax Officer Ward-6(3), Nagpur. Respondent.

Assessee by : Shri S.B. Hazare.
Department by : Shri Narendra Kane.
Date of Hearing : 06-01-2016
Date of Pronouncement : 31st March, 2016.

O R D E R

Per Shri Mukul K. Shrawat, J.M.

These are cross appeals for assessment year 2009-10 emanating from the order of learned CIT(Appeals)-II, Nagpur dated 05-09-2013. These appeals are consolidated and hereby decided by a common order.

2. Assessee's Appeal. (ITA No. 446/Nag/2013).

The ground raised by the assessee was corrected and the same is reproduced below :

> "On the facts and circumstances of the case, the Ld. CIT(Appeals)-II, Nagpur was not justified in sustaining the addition of Rs.64,35,000/- u/s 40A(3) on account of cash payment towards purchase of land as discussed in Para 2 of Assessment Order."

In respect of the grounds raised by the assessee the facts in brief as emerged from the corresponding assessment order passed u/s 143(3) dated 26-12-2011 were that the assessee firm is in the business of land development and construction. The AO had made an observation that during the year the assessee had purchased six land properties. On perusal of the purchase deeds it was found that the assessee had made cash payment of Rs.64,35,000/-. The cash payment was over and above the payments made through banking transaction. The total cost of the lands purchased shown as stock in trade amounted to Rs.3,61,12,567/-. The objection of the AO was that the payments have been made in excess of Rs.20,000/- in cash, hence infringed the provisions of section 40A(3) of the I.T. Act. The details of the payment made in cash was listed by the AO as under :

a. Banwadi Land dt.of purchase on 25/08/2008 Kh.No.88/1 for Rs.29,00,000/-	Rs.7,06,000/- at the time of agreement. Rs.4,94,000/- at the time of Registry on 25/08/2008.
b. Banwadi Land dt. Of purchase on 25/08/2008 Kh. No. 88/2 for Rs. 57,60,000/-	Rs.25,60,000/- at the time of agreement Rs.5,00,000/- at the time of Registry
c. Banwadi Land dt. of purchase on 30/03/2009/- Kh. No. 93/2	Rs. 75,000/- at the time of Registry.
d. Jogeshwari Land dt. of purchase on 30/03/2009 Kh. No. 40	Rs. 2,00,000/- on 25/10/2008

for Rs.17,00,000/-	Rs.2,00,000/- at the time of Registry on 05/11/2008
e. Salai Godhni Land dt. of purchase on 12-09-2008	Rs.10,00,000/- no date
Kh. No.4, Rs.43,00,000/-	Rs. 7,00,000/- at the time of Registry 12/09/2008
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Total	Rs.64,35,000/- disallowance u/s 40A(3) Against land purchase.

Against the said disallowance an appeal was filed.

3. The argument of the assessee before the learned CIT(Appeals) was that the payment was made in cash before the Sub Registrar at the time of execution of the sale deeds. The payments have been made to farmers who have insisted to receive the balance payment in cash. It is not a case of bogus transaction and the identity of the payee is ascertainable. It has also been argued that in the case of Attar Singh Gurmukh 191 ITR 667 (SC) a view was expressed that against the purchase of land the income has also been shown on sale of plots, therefore, disallowance u/s 40A(3) tantamount to dual tax. Learned CIT(Appeals) was not convinced and after referring few decisions held that the purchases have duly been debited to P & L account and the estate was shown as stock in trade, therefore, the provisions of section 40A(3) were correctly invoked by the AO.

4. Being aggrieved, the assessee is now in appeal before us.

5. From the side of the appellant learned A.R. Mr. S.B. Hazare appeared and pleaded that the provisions of section 40A were introduced as an anti tax evasion measure. There was no such intention of the assessee to evade the tax. The payment was made at the time of registration of the sale deed. The reason for cash payment, identity of the persons and the genuineness of the transaction have not been doubted. The payments have been made at the insistence of the parties. The assessee had purchased agricultural land from the villagers situated

in rural areas or villages. The land was recorded as agricultural land in Maharashtra Land Revenue Record. Therefore, under such specific circumstances, the part of the payment was made in cash. Case laws relied upon are as under :

i) Attar Singh Gurmukh vs. ITO (1991) 191 ITR 667 (SC).

ii) Ace India Abodes Ltd. vs. ACIT in ITA No. 79/JP/2001 dated 12-08-2011.

iii) S.A. Builders Ltd. vs. CIT(Appeals) 288 ITR 001 (SC)

6. On the other hand, from the side of the Revenue, learned D.R. Mr. Narendra Kane appeared and supported the orders of the Revenue authorities. He has pleaded that the payments in cash are exempt if covered under Rule 6DD. He has placed reliance on the order of MRS Roadways vs. CIT 52 taxmann.com 99 (Kerala). Learned D.R. has also pleaded that the payment in cash was squarely covered by the provisions of section 40A(3). Hence the action of the AO deserves to be affirmed.

7. We have heard both the sides and perused the material placed before us. At the outset it is worth to mention that on identical facts and circumstances where a Developer had made payments to farmers in cash at the time of purchase of land through a registered sale deed executed before Sub Registrar, the component of cash payment was held as admissible and the invocation of the provisions of section 40A(3) was found to be unjust. The ITAT, Raipur Bench in the case of ACIT vs. R.P. Real Estate Pvt. Ltd. (ITA No. 173/BLPR/2011) for assessment year 2008-09, order dated 17th July, 2015, has held as under :

"7. Upon careful consideration, we find that it is undisputed that the assessee has purchased the land from sellers who were illiterate villagers.

It is also not doubted that the payment has been made for the purchase of land. There is no doubt about the genuineness and identity of the sellers. Out of the total purchase of `.5,40,31,391/- during the year, payment of `,51,06,000/- i.e. only 11.30% has been made in cash. The assessee's plea for payment in cash is that the villagers from whom the land has been purchased are illiterate and some times insists on cash payment. It has been claimed that it was the business compulsion of the assessee that the assessee had to accept the insistence of the villagers as the assessee has purchased a large chunk of land and wanted to acquire the adjacent land in vicinity for launch of its project. It had to agree to some of the villagers in their demand of cash payments although the assessee was able to make major purchases by cheque. Moreover it is also on record that photos of sellers duly signed by them are recorded on the sale deed which was registered before the Sub Registrar. Hence there is no iota of doubt about the genuineness of payment and the identity of persons receiving the payments. The cash payments along with the dates are also mentioned in the sale deed. In these circumstances, in our considered opinion there is considerable force in the assessee's submission that there was reasonable cause for the assessee's failure to make payment otherwise than by crossed cheques. In this regard we find that similar issue was considered by ITAT, Delhi Bench in the case of Saraswati Housing and Developers v/s. Addl. CIT 142 ITD 198. The Tribunal in that case has referred to a decision of PACL India Ltd. v/s. ACIT of ITAT, Jaipur. The conclusion by the ITAT is as under :

> *"10. The factual matrix of the present case is para material with the case of PACL Ltd. v/s. ACIT because in the present case, the assessee has made payment to various villagers for purchase of agricultural land.*
>
> *Normally illiterate poor farmers would insist on cash payments, specially when such payments involve huge amounts at the place of their residence for the simple reason that they would like to avoid the risk of receiving cash at town where the sale deed is to be registered before sub-registrar and which may be far way from the sellers' village. In this situation, the seller has to confirm before the sub-registrar that full payment as per recital of the sale deed has been received by him. At the same time, the government authority i.e. sub-registrar satisfied himself upon the identity of the seller to ensure that the payment has been made to the right person. For the sake of convenience in the receipt, the place is mentioned as the town where the document is registered.*

From the assessment order we observe that the Assessing Officer has not made any effort to examine the very fact whether the payments were made and received by the sellers at their villages or at the town where the sale deed was registered.

11. Considering the entire facts and proposition that the payments were made at villages where banking facilities did not exist is accepted. After careful consideration of practical situation, we also observe that even it is assumed that payments were made at a town where banking facilities were available, the case of the appellant company would still fall under the exception of Rule 6DD(h). We further observe that Rule 6DD(h) of the Rules has to be interpreted liberally so as not to frustrate the object of the legislature. The object of s. 40A(3) is not to disallow genuine payments and r. 6DD has to be interpreted keeping in view the object of the main provision. The second proviso to s. 40A(3) refers to "the nature and extent of banking facilities available, considerations of business expediency and other relevant factors", which means that the object of the legislature is not make disallowance of such cash payments which have to be compulsorily made by the assessee in view of absence of banking facilities at the place of payment. As per submissions of the DR if it is assumed that the payment was made at the tehsil and district headquarter, the admitted position is that the sellers did not have any bank accounts at such town and they did not reside or carry on any business or farming activity at such town. The AO and the learned CIT(A) have observed that the appellant company could have opened bank accounts at such town in the name of the sellers. In our view, it would be too much to expect that the appellant company would be able to compel the villagers to open bank accounts at the town which ultimately they will not be able to operate as they do not reside at such town.

12. If such a myopic view is taken regarding the interpretation of r. 6DD(h), in our view, the very object of the legislature would be frustrated. There is no dispute regarding the identity of the payees and the genuineness of the land transaction in respect of which payments have been made. At this point, it is notable that r. 6DD(k) provides an exception in respect of cash payments which are made on a day on which the banks were closed. This exception provides that the object of the legislature is to provide an exception in respect of such payment which is required to be made in cash for absence of banking facilities. Therefore, we hold that in the present

case, the assessee made cash payment to the agricultural land seller villagers which are covered under second proviso to section 40A(3) of Rule 6DD(h) of the Rules.

13. On the basis of discussions made hereinabove we finally hold that the authorities below were not justified in confirming the disallowance of `.3,27,488 being the disallowance at 20 percent of cash payments to the land seller villagers of `.16,36,440 in excess of `.20,000 and the disallowance made u/s 40A(3) of the Act under appeal is found to be unjust, perverse which is not sustainable in the backdrop of statutory provisions. Accordingly, impugned order is set aside and disallowance and additions made thereunder are hereby deleted."

8. We find that the above case law is applicable on the facts of the case. Payees in this case also are illiterate villagers who wanted some of the payments to be done in cash. There is no dispute regarding identity of the payees and genuineness of the transaction. Moreover the above observations of the Tribunal are squarely applicable on the facts of the case. On the facts and circumstances of the case, we have no reason to differ from the view taken by the Tribunal as above which are directly applicable on the facts of the present case. The Hon'ble Apex Court in the case of Honda Ciel Power Products, Civil Appeal no. 5412 of 2007 has held that lack of consideration of a coordinate bench decision can render the order of the Tribunal liable for rectification of a mistake under section 254 of the I.T. Act. In this view of the matter, in the background of aforesaid discussion and precedent, we do not find any infirmity in the order of learned CIT(Appeals). Accordingly, we uphold the same."

8. Since this very bench has already taken a view after considering several case laws and the facts and circumstances of the case under which the cash payment was made to farmers at the time of registration of the sale deed and thereupon held that it was unjust to invoke the provisions of section 40A(3), therefore, respectfully following the above view, we hereby reverse the findings of the authorities below and direct to delete the addition. As a result, the ground raised before us is allowed.

9. In the result, the assessee's appeal is allowed.

10. B Revenue's Appeal (ITA No. 412/Nag/2013).

Ground No. 1:

"Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in not including various expenditure incurred by the assessee for development of land amounting to Rs.11,65,769/- for the purpose of valuation of closing stock of land."

The AO has raised a query in respect of difference worked out on the basis of the chart enclosed with the audit report filed for closing stock valuation. The assessee's explanation was that the impugned difference was due to the accounting of the expenses incurred for the development of land. The assessee had submitted some reconciliation, however, the AO had adopted the average cost of purchase and thereupon the difference was calculated which was taxed in the hands of the assessee.

11. When the matter was carried before the first appellate authority, relief was granted in the following manner :

" I have carefully considered the facts of the case and the submission of the appellant. I find substantial force in the submissions of the appellant. The method of valuation which has been adopted by the appellant for the closing stock has also been adopted in valuing the opening stock and this method has consistently been adopted by the appellant over the years. Factually there is no error in the valuation of the closing stock as the appellant has correctly valued the closing at his purchase price. Further if the method of valuation is changed, a corresponding change in the valuation of the opening stock would also have to be made which would nullify the impact of changing the valuation of closing stock. Also, in the event of upward valuation of the closing stock, a corresponding effect would have to be given in the opening stock in the subsequent year. Considering the above facts the said addition of Rs.11,65,769/- is hereby deleted. This ground is therefore allowed."

12. On this short issue we have heard both the sides and perused the material placed before us. The method adopted by the assessee was average purchase price. However, the AO had considered certain expenses such as legal expenses

etc. for the purpose of valuation of the closing stock. The assessee has furnished the calculation of the valuation stock and before the AO he has admitted that at best a difference in stock of Rs.2,31,360/- could be assessed. This offer of the assessee has duly been recorded in the assessment order. We, therefore, hold that after considering the submissions as well as the method of valuation, at best, a sum of Rs.2,31,360/- could be upheld by learned CIT(Appeals), instead of granting the total relief. To this extent we hereby modify the relief granted by the learned CIT(Appeals). The AO is directed to compute the addition accordingly. This ground of the Revenue is partly allowed.

13. Ground No. 2:

> "Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in deleting the disallowance of Rs.46,660/- made u/s 40A(3), without appreciating the fact that the photocopies of impugned bills/supporting vouchers were found self-made vouchers as well as overwritten and also the fact that the original bills/vouchers were not produced before the AO for verification during the course of assessment proceedings, the genuineness of the same could not be verified during the assessment proceedings."

The expenditure in question was towards purchase of uniform and payment to staff. Each payment was described by the assessee. However, the AO has taxed Rs.46,660/-. When the matter was carried before the first appellate authority, learned CIT(Appeals) has examined the expenditure incurred and thereupon arrived at a conclusion that the payments although were in cash but petty in nature, therefore, below Rs.20,000/-. On that basis he has held that the provisions of section 40A(3) were wrongly invoked.

14. We have heard the parties and thereupon arrived at the conclusion that learned CIT(Appeals) has rightly deleted the addition. No interference is required. This ground of the Revenue is dismissed.

15. Ground No. 3:

> "Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in deleting the additions of Rs.39,915/- ignoring the fact that the same were incurred by partners for personal use, for visit to a village called Domak, as held by AO and not for "Pooja expenses, travel and office expenses" claimed by the assessee."

This ground was directed against the disallowance made out of miscellaneous expenses by the AO. On perusal of the details of the expenditure it was found that the same was incurred for the purpose of travel, pooja expenses, office expenses etc. Learned CIT(Appeals) has held that considering the nature of the business as well as the scale of the business, the expenditure in question was related to the business activities of the assessee.

16. After hearing the submissions we are also of the view that the learned CIT(Appeals) has rightly granted relief after considering the nature of expenditure incurred vis-a-vis the nature of the business carried out by the assessee. As a result, this ground of the Revenue is, therefore, dismissed.

17. Ground No. 4:

> "Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in deleting the additions of Rs.89,700/- made by the AO on account of "Travelling for marketing" claimed by assessee without appreciating the fact that the same are interlinked expenses (visit to Domak village) being personal in nature."

The expenditure of Rs.1,64,871/- was claimed by the assessee as travelling expenses, out of which the AO had disallowed Rs.89,700/- because of the reason that the expenditure were not related to the business of the assessee. It was found to be for personal purposes such as "Domak tour" and Shree Gajanan tour" etc. When the matter was carried before the first appellate authority, learned CIT(Appeals) has allowed the claim by assigning the reason that in real estate business travelling is required. However, the said reasoning is

general in nature as against that the AO had made specific observation that some of the expenditure were connected with the business but personal in nature.

18. After considering the nature of expenditure and some of the details made available in the assessment order, we hereby uphold the addition to the extent of Rs.25,000/- and for rest of the amount the relief granted by learned CIT(Appeals) is hereby approved. As a result, this ground of the Revenue is partly allowed.

19. Ground No. 5:

> "Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in deleting the Entertainment Expenses of Rs.17,689/- claimed by the assessee without appreciating that no supporting evidences were produced before the AO for verification during the course of assessment proceedings."

Under the head "Entertainment Expenses" a sum of Rs.1,61,980/- was claimed out of which the AO had disallowed a sum of Rs.17,689/- by assigning the reason that part of the expenditure was personal in nature and not incurred for business purpose. When the matter was carried before the first appellate authority, learned CIT(Appeals) has made a general observation that the expenditure was generally incurred on customers.

20. However, we are not in agreement and hereby hold that the AO has verified the nature of the expenditure and thereupon arrived at a conclusion that there was an element of personal use of the partners. The facts of the case have also not totally ruled out the personal element. Hence we hereby reverse the finding of learned CIT(Appeals) and confirm the addition. This ground of the Revenue is allowed.

21. Ground No. 6.

Whether on the facts and in the circumstances of the case and in law the learned CIT(Appeals) has erred in deleting that disallowance of Rs.5,02,900/- made u/s 40a(2)(b) of the I.T. Act without appreciating that the same are made to relatives of the partners of the assessee firm."

The AO has examined the expenditure of commission paid to parties on sales. In his opinion, part of the sale amount to be received from the customers on booking of plots could not be received, therefore, it was not justifiable to pay the commission amount to those parties found to be relatives of the assessee. The AO was, therefore, of the opinion that there was no justification of payment of commission on the balance amount due from plot holders. By invoking the provisions of section 40A(2)(b) he has disallowed Rs.5,02,900/- as per the following calculation :

" In this background the assessee was asked to submit the details of the above persons against whom commission is payable/paid, the plots booked by them & amount paid by those plot holders as booking amount or total payment made during the year by the customers brought by the above commission agents during the F.Y. 2008-09 relevant to A.Y. 2009-10. The assessee has filed detail chart showing cost of plot, payment made by these plot holders. The following details are provided by the assessee:

Total cost of plots booked By 9 agents.	Amount paid by these plot Holders during the F.Y. 2008-09.	Balance payment due from plot holders as on 31/03/2009.
Rs.2,17,97,806/-	Rs.1,34,32,961/-	Rs. 83,68,591/-
100%	61.61%	38.39%

The above figures show that only 61.61% of payment is received by the assessee during the year against total cost of plots. This fact is also confirmed by assessee as stated earlier (O/s. noting dated 22/12/2011). The 38.39% plot cost outstanding against the plot holders for which 100% commission is paid to thee agents being relatives of the partners of the firm. Thus 38.39% out of total commission paid amounting to Rs.13,10,000/- is worked out to Rs.5,02,900/- which is excess payment. The same is not allowable expenditure within the meaning of section 40A(2)(b) & hence the same is disallowed and added to the total income. Penalty proceedings u/s 274 r.w.s. 271(1)(c) is initiated separately."

21.1. When the matter was carried before the first appellate authority, learned CIT(Appeals) has opined that in the absence of any comparable instance, the AO was not justified to invoke the provisions of section 40A(2)(b) of the I.T. Act.

21.2 Having heard the submissions of both the sides, we are of the view that for the purpose of invocation of the provisions of section 40A(2)(b) the first onus is on the AO to place on record his satisfaction that the expenditure was in excess of the fair market value. In this case no such attempt had been made by the AO. On the other hand, assessee's explanation was that the payment of commission was an ascertained liability of the assessee, hence in the interest of business the commission was paid even if the post dated cheques have been received from the customers at the time of booking of the plot. In our opinion, under the circumstances, the decision of payment of commission appears to be a business decision of the assessee. Moreover, the AO was not justified to invoke the provisions of section 40A(2)(b) in the absence of any evidence to compare the fair market value. As a result, we hereby confirm the findings of learned CIT(Appeals). This ground of the Revenue is, therefore, dismissed.

22. Cross Objection of the Assessee.

The grounds are as under :

1. On the facts and circumsrances of the case. the Ld. CTT Appeals \was perfectly justified in deleting the addition 0f" Rs.11,65.769/- on account of difference in valuation of' closing stock of land as discussed in Para 1 of the Assessment Order after revivification of detailed valuation of cost and further after appreciating the fact that determining. of closing stock valuation has resulted in inflation of notional profit and further corresponding effect would have to given in the opening stock in the subsequent year. As such the deletion of addition is justified even after considering the factual working of closing stock.

2. The Ld. ClT Appeals was further justified in deleting the addition of Rs.46,660/- u/s 40A(3) spent on uniforms of staff after due verification of fact that the individual expenditure was less than Rs. *20,0001*- per person as supported by vouchers which was not disputed or doubted as

genuine by the Ld. Assessing Officer.

3. The Ld. CIT Appeals was further justified in deleting the addition of *Rs.39.915I-* after due verification of vouchers and nature of expenses incurred on Travel, Pooja Expenses and Office Expenses which are directly relating to the business.

4. The Ld. CIT Appeals was further justified in deleting the addition of *Rs.89,700/-* spent on business promotion duly supported by bills and vouchers which was relating to travelling for marketing of Layout *1* Plots and duly supported by vouchers and clearly incurred for business purposes.

5. The Ld. CIT Appeals was further justified in deleting the addition of *Rs.17,689/-* towards tea and snacks incurred on customers on visit to the site of Layouts and as such correctly claimed as business expenditure.

6. The Ld. CIT Appeals was further justified in deleting the addition of *Rs.5,02.900/-* u/s 40a(2)(b) on account of commission expenses on verification of accounts and further on due satisfaction that the Ld. Assessing Officer was not justified in making the disallowance on pro rate basis of payment received from customers which was without any basis and as such correctly appreciated by CIT Appeals as business expenditure.

All these grounds raised by the cross objector are in support of the view taken by learned CIT(Appeals). However, while deciding the appeal of the Revenue, some of the grounds were allowed and some of them are dismissed. Hence following the decision already taken while deciding the appeal of the Revenue, we hereby hold that grounds of the cross objection No. 1,2,3 and 6 are allowed and ground No. 4 is partly allowed and ground No. 5 is dismissed. As a result, the cross objection of the assessee is partly allowed.

23. To sum up, the appeal of the assessee is allowed, however, Revenue's appeal and assessee's cross objection are partly allowed.

Order pronounced in the Open Court on this 31st day of March, 2016

Sd/-	Sd/-
(SHAMIM YAHYA)	(MUKUL K. SHRAWAT)
ACCOUNTANT M EMBER.	JUDICIAL MEMBER

Nagpur,
Dated: 31st March, 2016.

Copy forwarded to :
1. M/s Shree B & B Paradise Land Developers, C/o S.B. Hazare & Co., C.As., 678, Hazare House, Karnewar Marg, Sitabuldi, Nagpur.
2. I.T.O., Ward-6(3), Nagpur. ,
3. Commissioner of Income-tax- , Nagpur.
4. CIT(Appeals)-II, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

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By Order

Assistant Registrar, ITAT, Nagpur

Wakode.