

IN THE ITAT, DELHI BENCH

H.S. SIDHU, J.M. & L.P. SAHU, A.M.

Prime Infra Developers (P) Ltd. v. ITO

ITA No. 7144/Del/2017

27 June, 2018

Assessee by: Ved Jain, Advocate & Ashish Goel, CA

Revenue by: Atiq Ahmed, Sr. Departmental Representative.

ORDER

H.S. Sidhu, J.M.

The Assessee has filed this Appeal against the *Order, dt. 22-9-2017* of the learned Commissioner (Appeals)-38, New Delhi relating to assessment year 2013-14 on the following grounds :--

1. On the facts and circumstances of the case, tile order passed by the learned Commissioner (Appeals) is bad both in the eyes of law and on facts.
- 2(i) On the facts and circumstances of the case the learned Commissioner (Appeals) has erred both on facts and in law in passing the order without giving assessee an opportunity of being heard in violation of principle of natural justice.
- (ii) That the non appearance before the Commissioner (Appeals) was an account of reasons beyond the control of the assessee.
3. On the facts and circumstances of the case the learned Commissioner (Appeals) has erred both on facts and in law in confirming the disallowance of Rs. 1,54,97,974 made by assessing officer an account of cash payments invoking the provision of section 40A(3) of the Act.
4. On the facts and circumstances of the case the learned Commissioner (Appeals) has erred both on facts and in law in confirming the disallowance despite the fact that the reason for cash payment was an account of one of the reasons provided in exceptional circumstances for these payments under rule 6DD of the Act.
5. On the facts and circumstances of the case the learned Commissioner (Appeals) has erred both on facts and in law, in confirming the disallowance despite the payments having been made out of business expediency.
6. On the facts and circumstances of the case the learned Commissioner (Appeals) has erred both on facts and in law, in confirming the disallowance despite the fact that there being no doubt as to the genuineness of transactions and thus no disallowance under section 40A(3) can be made.
7. That the appellant craves leave to add, amend or alter any of the grounds of appeal.

2. The brief facts of the case are that the assessee-company is stated to be engaged in the business of real estate. The case of the assessee was selected under scrutiny through CASS. Accordingly, notice under section 143(2) of the Income Tax Act, 1961 (hereinafter referred as the Act). The assessee-company has purchased

various lands during the relevant period for residential project in Gurgaon. From the perusal of the details submitted by the assessee, assessing officer observed that the assessee-company has purchased various land. From the sale deed it has been noticed that substantial cash amount has been utilized for purchase of inventory. Total cash amount that has been paid for the purchase of inventory of Rs. 1,54,97,974. The assessee vide order sheet entry dated 2-3-2016 was asked to explain the reason for payment made in cash and it has also been asked to explain the same. The assessee vide submission dated 14-3-2016 has submitted that assessee-company is engaged in real estate and property development business and major activity of the company to launch the new residential and commercial projects. During the year company had been purchased the land in bulk from farmers to launch a residential project. It was further submitted that advance was paid as a token money for the execution of deal on Sunday i.e. the day which was public holiday for banks. The fact that the advance payment was made on Sunday i.e. 5-8-2012 is also mentioned to the registry itself and at that time of advance payment no banking facility was available due to bank holiday and the assessee-company had no alternative option to make the payment immediately. Thereafter, assessing officer observed that it may not be out of place to mention that payments in cash to persons who are holding land in and around Delhi are not out of purview of taxation. There is substantial possibility that the persons selling the land are not filing their return of income or not disclosing the full income. Thus the act of the assessee by making payment in cash cannot be assumed to be *bona fide*, even though it is in blatant violation of the provisions of section 40A(3) of the Income Tax Act. Accordingly, an amount of Rs. 1,54,97,974 was disallowed under section 40A(3) of the Act and income of the assessee was assessed at Rs. 1,54,97,970 under section 143(4) of the Act vide *Order, dt. 30-3-2016*. Against the assessment order, the assessee appealed before the learned Commissioner (Appeals), who vide his impugned *ex parte* order 22-9-2017 has dismissed the appeal of the assessee by observing that there was sufficient application of mind by assessing officer while framing the assessment and the factual findings regarding violation of clause (j) of rule 6DD have not been controverted by the assessee during appeal proceedings and in view of the continued non-compliance and non-prosecution of appeal by the assessee, he upheld the assessment order. Aggrieved with the impugned *Order, dt. 22-9-2017*, Assessee is in appeal before the Tribunal.

3. Learned Counsel of the assessee has filed a Paper Book containing pages 1-68 having the copy of acknowledgement return of income alongwith computation of income; copy of Audited Financial Statements; copy of reply filed with the assessing officer dated 18-2-2016 alongwith the copy of sale deeds of the property purchased; copy of reply filed by the assessee before assessing officer on 22-2-2016 and copy of letter filed before assessing officer dated 23-3-2016 enclosing affidavit from Real Estate Broker. He submitted that learned Commissioner (Appeals) has passing the *ex parte* order without giving assessee an opportunity of being heard in violation of principle of natural justice, despite the fact that non appearance before the Commissioner (Appeals) was an account of reasons beyond the control of the assessee. It was further submitted that learned Commissioner (Appeals) wrongly confirmed the disallowance of Rs. 1,54,97,974 made by assessing officer an account of cash payments invoking the provision of section 40A(3) of the Act despite the fact that the reason for cash payment was an account of one of the reasons provided in exceptional circumstances for these payments under rule 6DD of the Act. It was the further contention that learned Commissioner (Appeals) has wrongly confirmed the disallowance despite the payments having been made out of business expediency and also wrong in confirming the disallowance despite the fact that there being no doubt as to the genuineness of transactions and thus no disallowance under section 40A(3) can be made. In the last, it was also submitted that the payment was made on 5-8-2012 i.e. Sunday is not disputed by the authorities below and rule 6DD(j) specifically provides exception for disallowance under section 40A(3) on the day on which banks are closed. The payment were made to farmers for purchase of their agricultural land and the payments were duly supported by the various documentation in form of conveyance deed etc. Therefore, he stated that disallowance under section 40A(3) is uncalled for. To support his contention he filed another Paper Book containing pages 1-72 having the copies of following case laws on the issue when payment is made on the day on which banks are closed and the exception is covered under rule 6DD and on the issue when genuineness of the transaction is not doubted by the assessing officer, then no disallowance under section 40A(3) is called for.

-- Hon'ble High Court of Madras decision in the case of *Hotel Nagas (P) Ltd. v. CIT, Salem* in (T.C.A. No. 317 of 2008, dt. 7-4-2016)

-- Hon'ble High Court of Andhra Pradesh decision in the case of *Sri Laxmi Satyanarayana Oil Mill v. CIT, AP, Hyderabad (2014) 367 ITR 200 (Andhra Pradesh)*

-- Hon'ble High Court of Punjab and Haryana decision in the case of *Gurdas Garg v. CIT (Appeals), Bathinda in (IT Appeal No. 413 of 2014, dt. 16-7-2015).*

-- ITAT, Jaipur decision passed in *ITA No. 5170/Del/2014* in the case of *ITO v. Shyam Apparels (P) Ltd. and Viceversa.*

-- ITAT, Delhi decision dated 31-8-2016 passed in *ITA No. 504/2016* in the case of *ACIT, Faridabad v. M/s. Marigold Merchandies (P) Ltd.*

-- ITAT, Delhi decision in the case of *Galaxy Dwellers (P) Ltd. v. CIT in (IT Appeal No. 5293/Del/2013 & I.T. Appeal No. 3029/Del/2014, dt. 15-9-2017).*

-- Hon'ble Rajasthan High Court decision in the case of *CIT v. ACE India Abodes Ltd. in (D. B. Income Tax Appeal No. 45 / 2012, dt. 11-9-2017).*

-- Hon'ble Rajasthan High Court decision in the case of *Smt. Harshila Chordia v. ITO (2008) 298 ITR 349 (Raj).*

4. On the other hand, learned Sr. Departmental Representative relied upon the orders of the authorities below. He submitted that assessee-company has purchased various land. From the sale deed it is revealed that that substantial cash amount has been utilized for purchase of inventory. Total cash amount that has been paid for the purchase of inventory of Rs. 1,54,97,974. He further submitted that that payments in cash to persons who are holding land in and around Delhi are not out of purview of taxation. There is substantial possibility that the persons selling the land are not filing their return of income or not disclosing the full income. Thus the act of the assessee by making payment in cash cannot be assumed to be *bona fide*, even though it is a complete violation of the provisions of section 40A(3) of the Income Tax Act. However, there was sufficient application of mind by assessing officer while framing the assessment and the factual findings regarding violation of clause (j) of rule 6DD have not been controverted by the assessee during appeal proceedings and in view of the continued non-compliance and non-prosecution of appeal by the assessee, learned Commissioner (Appeals) has rightly upheld the assessment order, which does not need any interference on our part. In view of above, learned Sr. Departmental Representative requested that the order of the learned Commissioner (Appeals) may be upheld and appeal of the assessee may be dismissed.

5. We have heard both the parties and perused the records, especially the orders of the authorities below, Paper Book filed by the Assessee containing pages 1-68 having the copy of acknowledgement return of income alongwith computation of income; copy of Audited Financial Statements; copy of reply filed with the assessing officer dated 18-2-2016 alongwith the copy of sale deeds of the property purchased; copy of reply filed by the assessee before assessing officer on 22-2-2016 and copy of letter filed before assessing officer dated 23-3-2016 enclosing affidavit from Real Estate Broker and the case laws cited by the learned Counsel of the assessee in shape of Paper Book and the copy of Calendar for the Year 2012. We find that assessee-company is a real estate developer and major activities of the company is to launch new residential & commercial projects and during the year under consideration, Assessee Company had purchased various lands in Gurgaon from farmers for a residential project. Details of which are as under :--

S. No.	Property	Details of advance payment in cash (as advance being made on 5-8-2012 i.e. Sunday) & PB Pg. where date is appearing.	Details of payment in cash at the time of registry
1.	Dhankot 33Kanal 11Marla 5.5S (Sale Deed at PB Pg. 15-25)	Rs. 38,60,730 (PB Pg. 21) & date 5-8-2012 is appearing at PB Pg. 19	9,65,179.00 (Pb. Pg. 23)
2.	Dhankot 26K 8M (Sale	Rs. 33,33,000 (PB Pg. 30) and dated 5-8-	--

S. No.	Property	Details of advance payment in cash (as advance being made on 5-8-2012 i.e. Sunday) & PB Pg. where date is appearing.	Details of payment in cash at the time of registry
	Deed at PB Pg. 26- 33)	2012 is appearing at PB Pg. 30	
3.	Dhankot 26K 8M (PB Pg. 34-44)	56,62,600 (PB Pg. 40) & date 5-8-2012 is appearing at PB Pg. 38	14,15,600 (PB Pg. 42)
4.	Dhankot 1K 0M 3.5S (Pb. Pg. 45-52)	1,28,691 (PB Pg. 49) & date 5-8-2012 is appearing at PB Pg. 49.	32,174 (PB Pg. 51)
5.	Dhankot 0K 6M 4S (PB Pg. 5359)		1,00,000 (PB Pg. 55)
	TOTAL	1,29,84,421	25,12,953

5.1 After perusing the aforesaid table, we note that the assessee-company has made advance payment of Rs. 1,29,84,421 for the purchase of various lands to the farmers as a token money for the execution of the deal on Sunday i.e. the day which was public holiday for Banks. It is undisputed fact that the payment is made on 5-8-2012 which is mentioned in the registered document i.e. sale deed itself. The date on which the advance payment was made was 5-8-2012 and on that date banking facility was not available due to Bank Holiday and the assessee-company has no alternative option and had to make payment in cash and the same is not disallowed under section 40A(3) of the Income Tax Act and expressly provided in the exceptions provided in rule 6DD(j) which reads as under :--

"(j) where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike;"

5.2 We further note that on the date of registry assessee went to farmers' home to take them for registration of land. However, farmers changed their mind and demanded more money than what they had earlier agreed into. Then the assessee-company had no option but to make immediate payment due to the following reasons on account of business expediency :--

I. There was no time to avail banking facility at it would have resulted into lapse of time for registry.

II. Assessee company has already made the substantial payments to farmers any further delay in registry would have made their advance payment at risk. Moreover, the time of registry was going to be lapsed.

5.3 Thus, assessee had no option at the time of registry but to make these payments of Rs. 25,12,953 in cash due to its business expediency and thus covered by the proviso to section 40A(3) which reads as under :--

"Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, 34 (or use of electronic clearing system through a bank account, 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.)"

5.4 Thereafter, the case of the company was selected for scrutiny and statutory notice under section 143(2) of the Income Tax Act, 1961 was issued to the assessee. During the assessment proceedings, assessee was asked to explain the reason for payment in cash with respect to the aforesaid deals. In response to the same, the assessee filed its detailed reply dated 14-3-2016 (PB Pg. 60-65, the Copy of which is reproduced in the Assessment Order itself) and submitted that :--

i. The fact that advance payment is made on Sunday i.e. on 5-8-2012 is mentioned in registry itself.

- ii. Assessee company has also explained the reason for making payment in cash at the time of registry.
- iii. Genuineness of the payments made by the assessee was not doubted by the assessing officer.
- iv. Business expediency was not challenged by the assessing officer. No adverse comment by the assessing officer.

5.5 We observe that during the assessment proceedings, the assessee also submitted the copy of sale deeds (PB Page 13- 59) as well as affidavit from the Real Estate broker (PB Page 66-68). The assessing officer however not being satisfied by all the claims and arguments advanced by the assessee made a disallowance of Rs. 1,54,97,974 by invoking provisions of section 40(A)(3). Aggrieved with the same, the assessee went into appeal before the learned Commissioner (Appeals), who vide his impugned order sustained the addition made by the assessing officer.

5.6 In view of the aforesaid facts, it is crystal clear that the payment was made on Dt. 5-8-2012 i.e. 'Sunday' which is not disputed by the assessing officer as well as learned Commissioner (Appeals) and rule 6DD(j) specifically provides exception for disallowance under section 40A(3) on the day on, which banks are closed. The payments were made to farmers for purchase of their agricultural land and the payments are duly supported by the various documentation in form of conveyance deed etc. Therefore, in the above circumstances, disallowance made under section 40A(3) is not justified. Our aforesaid view is fortified by the following decisions :--

I. When payment is made on the day on which Banks are closed and the exception is covered under rule 6DD:--

(a) *Hotel Nagas (P) Ltd. v. CIT in T.C.A. No. 317 of 2008, dt. 7-4-2016*

a. "Therefore, if as rightly observed by the Tribunal in paragraph 4 of its order, the purpose of section 40A(3) is to discourage cash transactions leading to circulation of unaccounted money, then, the same may not normally happen before the Sub Registrar at the time of registration of documents, as the payments made at that time get recorded officially.(Para 22).

b. All the three authorities have failed to appreciate that when a vast extent of agricultural lands is purchased from several persons, especially in villages, it is not possible to expect the villagers to accept the sale consideration by way of crossed account payee cheque or bank draft. Therefore, so long as the payees are identified and the genuineness of the transaction is not questioned and so long as the payments have been made at the time of registration in the presence of the Sub Registrar, the case would fall under the exceptions provided in Clause (j) of rule 6DD. This position has also been clarified by *Circular No. 220, dt. 31-5- 1977*. (Para 23)"

(b) *Sri Laxmi Satyanarayana Oil Mills v. CIT (2014) 367 ITR 200 (T&AP)*

a. "Several High Courts followed this dictum and took the view that the provision must be interpreted liberally and the assessee cannot be subjected to undue rigor. The Rajasthan High Court in *Smt. Harshila Chordia v. ITO (2008) 298 ITR 349 (Raj)* went a step further, and held that the circumstances mentioned in the circular of the CBDT cannot be said to be exhaustive, and that the Board clearly expressed the view that clause (j) of rule 6DD must be liberally construed.

b. As observed by the Supreme Court, once an assessee furnishes the circumstances under which the payment in the manner prescribed in section 40A (3) was not practicable or would have caused genuine problems, the proviso, and thereby the rule 6DD, get attracted. The Parliament did not intend that payment of Rs. 2,500; or more, must be made only through the crossed cheque. This is evident from the proviso to section 40A(3), rule 6DD, and the circulars issued from time to time. Clause 6(j)(2) of rule 6DD take in their fold, all the circumstances, under which an assessee faces in the course of his business. Paragraph 3(vi) of the circular of the CBDT has

further widened the scope of 'the rule, by mentioning that if the payment, otherwise than through cheque was made, on being promised and specific discount by the seller, the rigor of section 40A(3) does not apply.

c. Coming to the facts of the case, the consistent plea of the applicant was that it had to make the payment for purchase of the ground-nut, in cash, because the seller not only insisted on that, but also gave incentives, such as facility of payment within one week, and discount. The certificate issued by M/s. "Satyanarayana Trading Company supported this. The question as to whether there was justification on the part of the seller of the goods in imposing such conditions, is outside the scope of the enquiry. As a matter of fact, there existed some justification for the traders, at least at the relevant point of time, in insisting the payment of amounts, in cash. The reason is that the banking activity was not that prominent and popular, and instances of cheques issued by agencies or persons, in the course of business being bounced, were not infrequent. The delay in receiving the consideration for any material supplied by a trader would have its own cascading effect on the business activities. It is only when both the parties to the contract are known to each other so intimately, and the seller is very confident not only of the solvency of the purchaser, but also his business ethics, that he would be inclined to receive the consideration through cheque.

d. Obviously because the Parliament as well as the CBDT were live to these issues, the provisions, referred to above, were enacted or incorporated. The Assessing Authority has taken a hyper-technical view and failed to discern the spirit underlying the relevant provisions. Though the Appellate Authority exhibited an element of objectivity, it was only in a limited aspect. The Tribunal has ignored the purport of the relevant provisions of law and refused to grant any relief to the assessee."

(c) *ITO Ward 3 (2), Jaipur v. M/s. Shyam Apparels (P) Ltd. & Vice-Versa (ITA No. 497- 549/JP/2016, dt. 7-11-2017)*

a. Addition made by the assessing officer under section 40A(3)--payment to two sellers of the land in 'cash under the business exigency--Held that:- The payment of Rs. 1,82,40,000 to Shri Ashok Agarwal, power of attorney holder of his daughter, the amount was paid on Sunday and also the seller has given the notice to release the payment by 25-3-2012, which was Sunday. Sunday was a bank holiday. Under these compelling situations, the assessee had to make payment in cash. The revenue has failed to controvert these facts, therefore, we find no merit in this ground of revenue's appeal. The same is dismissed.

As far as the assessee's appeal is concerned, we have noticed that the evidences have been filed which establishes that the documents for registration submitted after the banking hours in respect of land purchased from Hira Lal Khetan for Rs. 13,62,658 and from Smt. Shanta Devi Mittal for Rs. 11,75,000. No such evidence is available on record in respect of other purchases. The assessee has also sold his property on 15-9-2011 for which a deed was also executed in favour of M/s. Ocean Seven Buildtech (P) Ltd., Gurgaon on the same day after banking hours. It was submitted that Director of M/s. Ocean Seven Buildtech (P) Ltd. reached to Jaipur on 15-9-2011 after the banking hours, therefore, the payments against the sale deed were received in cash due to closure of the banking hours and the same cash received from this party was further paid to these two parties from whom the land was purchased by the assessee. These facts are verifiable from these two purchase deeds, which were duly filed before the assessing officer. Therefore, it is established that the assessee has to make payment to these two sellers of the land in cash under the business exigency to safeguard the interest and also for genuine and *bona fide* needs of assessee's business. It is also a fact that these purchases and sale deeds were put forth before the Registrar on the same day after banking hours which strengthen the contention of the assessee. The cash received on the sale of the land was utilized for making payment to two parties. These deeds were registered after 4.00 P.M., which is usually the banking hours. Therefore, considering all these facts and circumstances, we partly allow this ground of assessee's appeal."

(d) *ITO Faridabad v. M/S Marigold Merchandise (P) Ltd. (ITA No. 5170/Del/2014, dt. 11-9-2017)*

a. Addition made under section 40A(3)--purchase of land holding these cash payment falls under exceptional circumstances read with rule 6DD of Income Tax Rules--Held that:--Commissioner (Appeals) has rightly held that the assessee's case is found to be covered under the exceptional circumstances under rule 6DD of Income Tax Rules. Accordingly, the addition made by the assessing officer amounting to Rs. 60 lacs was rightly deleted by the learned Commissioner (Appeals).--Decided in favour of assessee.

II. When Genuineness of the transaction is not doubted by the assessing officer, no disallowance under section 40A(3) is called for :--

5.7 We note that in the present case the genuineness of the transactions which were entered by the assessee have not been disputed by the authorities below. This fact is evident from the plain reading of the Orders of the authorities below. We further note that the authorities below have not raised any doubt about the genuineness of the transaction therefore there is no dispute regarding the identity of the payee or the veracity of the transaction. The only objection raised was the violation of provisions of section 40(A)(3). Thus once the transaction are considered genuine and *bona fide*, then the same are taken out of the purview of the section 40(A)(3). This view is fortified by the following case laws :--

-- Decision of Hon'ble Punjab & Haryana High Court in the case of *Gurdas Garg v. The CIT* in (ITA No. 413 of 2014, dt. 16-7-2015) the facts of which are *pari materia* to the present case. The Hon'ble Punjab & Haryana High Court has held as observed as under (Head Notes only) :--

"Section 40A(3) of the Income Tax Act, 1961 read with rule 6DD of the Income Tax Rules, 1962--Business disallowance--Cash payments exceeding prescribed limits (Genuineness of transactions)--During assessment proceedings assessing officer noted that assessee, who was engaged in trading in properties, made certain transactions in cash in excess of Rs. 20,000 and disallowed same under section 40A(3)--Whether since genuineness of said transactions had not been disbelieved by authorities below, it made out a case of business expediency and could not be disallowed under section 40A(3)."

-- Hon'ble Rajasthan High Court in the case of *Harshila Chordia v. ITO (2008) ITR 349 (Raj)* wherein the Court observed as under (Heads Note Only)

"Addition under section 40A(3)--payments through bank only--held that requirement under rule 6DD(j) are deemed to have been satisfied if genuineness of transactions & payments & identity of receiver is established--additions are invalid--assessability of amount of cash credits would be finalized after assessing officer outcome."

6. In the background of the aforesaid discussions and respectfully following the precedents, as cited above, the disallowance of Rs. 1,54,97,974 under section 40A(3) of the Income Tax Act, 1961 made by the assessing officer and sustained by the learned Commissioner (Appeals) is not justified, hence, the same is deleted and accordingly the appeal of the assessee stands allowed.

7. In the result, the appeal of the assessee is allowed.