

In the High Court of Judicature at Madras

Reserved on : 30.10.2015 & Delivered on : 07.4.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and

The Honourable Mr.Justice T.MATHIVANAN

T.C.A.No.317 of 2008

Hotel Nagas Private Limited
Salem-1.

...Appellant

Vs

The Commissioner of Income Tax,
Salem.

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 8.7.2005 made in I.T.A.No.1134/Mds/2001 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai.

For Appellant	:	Mr.N.V.Balaji
For Respondent	:	Mr.S.Rajesh,Jr.Standing Counsel for I.T. appearing on behalf of Mr.J.Narayanasamy Sr.Standing Counsel

JUDGMENT

V.RAMASUBRAMANIAN,J

This tax case appeal is by the assessee. It was admitted on 9.7.2008 on the following substantial questions of law :

"1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the disallowance of 20% of total consideration paid to agriculturists in respect of

purchase of agricultural lands in the light of Finance Minister's explanation regarding the scope and sweep of Section 40A(3) ? and

2. Whether the Tribunal was justified in upholding the disallowance, when the genuineness of the cash payments have not been doubted by the authorities and further considering the business expediency and in the light of the Supreme Court decision in 191 ITR 667, there was no scope for disallowance under Section 40A(3)?"

2. Heard Mr.N.V.Balaji, learned counsel for the appellant/assessee and Mr.S.Rajesh, learned Junior Standing Counsel appearing for Mr.J. Narayanasamy, learned Senior Standing Counsel for the Department.

3. The assessee filed a return of income for the assessment year 1996-97. The return of income was processed under Section 143(1)(a) and was selected for scrutiny. A notice under Section 143(2) was issued.

4. Several issues were raised in the course of scrutiny assessment. But, we are concerned only with one issue in this appeal. This relates to cash payments to the total tune of Rs.29,50,000/- made by the assessee to the sellers of certain lands. In terms of Section 40A(3) of the Income Tax Act, 1961, 20% of all cash payments in excess of Rs.10,000/-, were disallowed. In other words, out of the total cash payment of Rs.29,50,000/-, a sum of Rs.5,90,000/- was disallowed and the same was added to the total income of the assessee.

5. The assessee filed a statutory appeal. In the appeal, they claimed

that the lands were purchased from 46 persons under different sale deeds and that in respect of 8 such sales, cash payments had to be made to the total tune of Rs.29,50,000/-. The assessee claimed that the cash payments were made before the Sub-Registrar and that since the payments were made for the purchase of agricultural lands, Section 40A(3) will not get attracted. But, the Commissioner of Income Tax (Appeals), by an order dated 28.2.2001, upheld the order of the Assessing Officer in so far as it related to Section 40A(3).

6. Therefore, on that issue, the appellant filed a further appeal to the Tribunal. The Tribunal held that even Rule 6DD (j) of the Income Tax Rules cannot be invoked to the benefit of the assessee and dismissed the appeal forcing the assessee to come up with the above appeal under Section 260A.

7. Though two questions of law have been framed, both of them revolve around the only question as to whether the assessee would be entitled to the benefit of the exception indicated in the Proviso to sub-section (3) of Section 40A or not. But, the same question is split into two for the purpose of focussing on 2 things namely (i) what was purchased was only agricultural lands and (ii) what necessitated the payment in cash was business expediency. Therefore, we may take up both the questions together.

8. Under Section 40A(3), if any payment is made in excess of Rs.10,000/- otherwise than by way of crossed cheque drawn on a bank or by

way of a crossed demand draft towards any expenditure, 20% of such expenditure will not be allowed as deduction. While this is the general rule, the rule is not without exception. The exception is dealt with in the Proviso. As per the Proviso, no disallowance under Sub-Section (3) can be made, if it has been necessitated (i) on account of the nature and extent of banking facilities available (ii) on account of considerations of business expediency and (iii) on account of other relevant factors. There are no clear guidelines as to what 'business expediency' means and as to what would constitute 'relevant factors' under Section 40A(3). But, Rule 6DD of the Income Tax Rules, 1962 lists out the cases and circumstances, in which, the Proviso to Sub-Section (3) could be invoked.

9. Rule 6DD of the Income Tax Rules, 1962, states that no disallowance under Sub-section (3) of Section 40A shall be made where any payment in a sum exceeding Rs.10,000/- is made otherwise than by a crossed cheque or by a crossed bank draft in the cases and circumstances specified therein. There are 10 types of cases and circumstances listed out under Rule 6DD, from Clauses (a) to (j). Clause (a) contains the list of institutions, the payment into which by way of cash will be exempted from disallowance. Clause (b) deals with the payment to Government. Clause (c) deals with the payment under any contract entered into before 01.4.1969. Clause (d) relates to the payment made by way of a letter of credit, mail transfer, book adjustment or by way of a bill of exchange. Clause (e) relates

to the payment made by way of adjustment against the amount of any liability incurred for goods supplied or services rendered. Clause (f) relates to the payment made for the purchase of agricultural produce or produce of animal husbandry, etc. Clause (g) deals with payment made for the purchase of products manufactured or processed without the aid of power in a cottage industry. Clause (h) deals with payments made in a place where there is no banking facility, to a person ordinarily resident in that village. Clause (i) relates to payment of gratuity, retrenchment compensation and similar benefits to employees.

10. The case on hand does not fall under any one of the categories enumerated in Clauses (a) to (i). But, Clause (j) contains a residuary provision which reads as follows:

"(j) in any other case, where the assessee satisfies the Assessing Officer that the payment could not be made by a crossed cheque drawn on a bank or by a crossed bank draft -

(1) due to exceptional or unavoidable circumstances, or

(2) because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof,

and also furnishes evidence to the satisfaction of the Assessing Officer as to the genuineness of the payment and the identity of the payee."

11. Therefore, to invoke the benefit of Clause (j) of Rule 6DD, the

assessee should satisfy the Assessing Officer that payment could not be made by way of a crossed cheque or a demand draft (a) either due to exceptional or unavoidable circumstances, (b) or due to the fact that having regard to the nature of the transaction and the necessity for expeditious settlement, it was not practicable to make payment by way of crossed cheque or demand draft.

12. Clause (j) of Rule 6DD thus uses certain new expressions, such as (a) exceptional circumstances, (b) unavoidable circumstances, (c) practicality and (d) genuine difficulty.

13. A plea that the payment in the manner prescribed by law was not practicable or that it would have caused genuine difficulty, are not sufficient by themselves to attract the benefit of Clause (j), unless such impracticality or genuine difficulty is shown to have arisen out of the nature of the transaction and the necessity for expeditious settlement.

14. All types of cases covered by Clause (j) required further proof to establish the genuineness of the payment and the identity of the payee.

15. Keeping the scope and ambit of Rule 6DD(j) in mind, if we come back to the case on hand, it is seen that the cash payments made by the appellant were for the purchase of immovable properties. Admittedly, several lands were purchased by the appellant from about 46 persons under different sale deeds. Out of those 46 sale deeds, it is only under 8 sale deeds that cash payments were made. These cash payments were made before the Sub

Registrar and they were made for the purchase of agricultural lands.

16. Therefore, the two fundamental requirements, namely (a) the genuineness of the payment, and (b) the identity of the payee, stands satisfied in the case on hand.

17. That leaves us with the question whether the assessee had pleaded and proved either of the other two requirements, namely (a) existence of exceptional or unavoidable circumstances, or (b) impracticality or genuine difficulty arising out of the nature of the transaction and the necessity for expeditious settlement.

18. Unfortunately, neither the Commissioner of Income Tax (Appeals), nor the Tribunal went into this question. The Commissioner of Income Tax (Appeals) did not even consider the scope of Rule 6DD. The Commissioner of Income Tax (Appeals) proceeded on the basis of the judgment of the Supreme Court in *Attar Singh Gurmukh Singh v. Income Tax Officer* [191 ITR 667]. But, admittedly, the said case related to payments made for acquiring stock in trade or other raw materials. Since the assessee claimed that they were purchasing and selling lands and that the same would constitute stock in trade, the Commissioner of Income Tax (Appeals) confined his discussion to this point alone.

19. But, the parameters on which the applicability of the proviso to Sub-section (3) of Section 40A, as enumerated in Rule 6DD(j) are to be tested, were not even considered by the Commissioner of Income Tax

(Appeals).

20. Though the Tribunal took note of Rule 6DD(j), the Tribunal held the same to be inapplicable to the case of the appellant on the ground that the assessee could not produce anything to show the existence of the parameters indicated in Clause (j).

21. But, the Tribunal overlooked the fact that both before the Assessing Officer and before the Commissioner of Income Tax (Appeals), the assessee had indicated the number of transactions that they entered into and the number of transactions in which cash payments were necessitated. There is no indication in the order of the Tribunal whether the original records were called for and examined. The grounds of appeal filed by the appellant before the Commissioner of Income Tax (Appeals) show that the appellant purchased agricultural land of a total extent of about 31.32 acres for a total amount of Rs.52,05,138/- from about 46 persons. These 46 persons had actually executed a power of attorney in favour of the Managing Director of the appellant. Out of these 46 persons, the cash transactions were made in favour of only 8 persons. Payments were made before the Sub Registrar at the time of the registration.

22. 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.

23. 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 dated 31.5.1977, the relevant portion of which reads as follows:

"4. All the circumstances in which the conditions laid down in rule 6DD(j) would be applicable cannot be spelt out. However, some of them which would seem to meet the requirements of the said rule are :

- a. the purchaser is new to the seller, or*
- b. the transactions are made at a place where either the purchaser or the seller does not have a bank account; or*
- c. the transactions and payments are made on a bank holiday; or*
- d. the seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller; or*
- e. the seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchased the goods; or*
- f. specific discount is given by the seller for payment to be made by way of cash."*

24. In **Walford Transport (Eastern India) Ltd. v. CIT [240 ITR 902]**, a Bench of the Gauhati High Court took a view that where the transaction is found to be genuine and the identity of the payee is established, a liberal view of compelling and mitigating circumstances should be taken.

25. As observed by the Gujarat High Court in **Anupam Tele Services v. Income Tax Officer [366 ITR 122]**, the object of Section 40A(3) is to curb and reduce the possibilities of black money transactions. The provision does not eliminate considerations of business expediencies. Genuine and bonafide transactions were held by the Supreme Court in *Attar Singh Gurmukh Singh* to be taken out of the sweep of Section 40A(3).

26. Mr.S.Rajesh, learned Standing Counsel for the Department placed heavy reliance on the decision of the Calcutta High Court in **Bagmari Tea Co. Ltd. v. Commission of Income Tax [251 ITR 640]** and contended that Section 40A(3) cannot be made redundant by permitting cash transactions on the ground that those payments were genuine. In paragraph 6 of the said decision, it was held as follows:

"6. With respect we are of the view that when the payment is made in contravention of section 40A(3) though the payment is genuine, that cannot be allowed, because the genuineness of payment is required in all cases but payment by account payee cheque or demand draft is additional requirement under section 40A(3). If we follow the view that the payment is genuine, then that should not be disallowed. In that case the provision of section

40A(3) will become redundant. Therefore, unless there are unavoidable circumstances for payment in cash, that payment will be hit by the provision of section 40A(3). The finding of the Assessing Officer and the Commissioner (Appeals) as well as the Tribunal was that there was no unavoidable circumstances for payment by cheque or bank draft. When there were no compelling circumstances or the assessee was not compelled to make payment in cash, in such circumstances we find no infirmity in the order of the Tribunal."

27. But, in the case before the Calcutta High Court, there was a clear finding both by the Assessing Officer as well as by Commissioner of Income Tax (Appeals) that there were no unavoidable circumstances compelling the assessee to make payment by way of cash. Such a finding is absent in the case on hand.

28. Therefore, we are of the considered view that the questions of law are to be answered in favour of the assessee. Accordingly, they are answered in favour of the assessee and the appeal shall stand allowed. No costs.

(V.R.S.J.) (T.M.J.)
07.4.2016.

Index : Yes or No
Internet : Yes or No

RS/kpl

To

- 1.The Commissioner of Income Tax, Salem.
- 2.The Income Tax Appellate Tribunal, 'D' Bench, Chennai.

V.RAMASUBRAMANIAN,J,
and
T.MATHIVANAN,J.

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P.D.JUDGMENT IN
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