

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ “बी” पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE**

श्री आर. के. पांडा, लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA Nos.1267 to 1269/PN/2014
निर्धारण वर्ष / Assessment Years : 2006-07 to 2008-09

Smt. Sapna Sanjay Raisonni,
A-301, Shri Shantinagar Society,
S.No.63/1/3, Kondhwa,
Pune – 411037
PAN No.ACDPR0459D

..... अपीलार्थी /
Appellant

बनाम v/s

ITO, Ward-2(1), Pune

..... प्रत्यर्थी /
Respondent

आयकर अपील सं. / ITA Nos.1270 to 1272/PN/2014
निर्धारण वर्ष / Assessment Years : 2006-07 to 2008-09

Shri Manikchand Ganeshmal Raisonni,
Flat No.2, Greenleaf Apartment,
Behind Trendz Furniture,
Lullanagar, Pune – 411040
Maharashtra
PAN No.AARPR3937J

..... अपीलार्थी /
Appellant

बनाम v/s

ITO, Ward-2(1), Pune

..... प्रत्यर्थी /
Respondent

आयकर अपील सं. / ITA Nos.1273 to 1275/PN/2014
निर्धारण वर्ष / Assessment Years : 2006-07 to 2008-09

Shri Sanjay Manikchand Raisonni,
A-301, Shri Shantinagar Society,
S.No.63/1/3, Kondhwa,
Pune – 411037
PAN No.AASPR4766Q

..... अपीलार्थी /
Appellant

बनाम v/s

ITO, Ward-2(1), Pune

..... प्रत्यर्थी /
Respondent

आयकर अपील सं. / ITA Nos.1276 to 1278/PN/2014
निर्धारण वर्ष / Assessment Years : 2006-07 to 2008-09

Shri Santosh Manikchand Raisoni,
A-301, Shri Shantinagar Society,
S.No.63/1/3, Kondhwa,
Pune – 411037
PAN No.ACDPR0459D

..... अपीलार्थी /
Appellant

बनाम v/s

ITO, Ward-2(1), Pune

..... प्रत्यर्थी /
Respondent

अपीलार्थी की ओर से / Assessee by : Shri Sunil Pathak

प्रत्यर्थी की ओर से / Revenue by : Shri Aseem Sharma

सुनवाई की तारीख / Date of Hearing :05.01.2016	घोषणा की तारीख / Date of Pronouncement:29.02.2016
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आदेश / ORDER

PER VIKAS AWASTHY, JM :

These bunch of 11 appeals are filed by the assesseees. Since common issues arising from same set of facts are involved in these appeals, these appeals are taken up together for adjudication.

2. In the present set of appeals, the assesseees have raised nine grounds. However, a perusal of grounds of appeal would show that these elaborate grounds involve two issues only. Ground No.1 to 5 relate to disallowance u/s.40A(3) in respect of cash payments made to Maharashtra State Road Transport Corporation (in short “MSRTC”) and other Govt. Organisations. In Ground Nos. 6 to 8 the assesseees have assailed the findings of CIT(A) in disallowing interest u/s.36(1)(iii), on interest free advances made to related parties from interest bearing borrowed funds. The ground No.9 is general in nature.

The Ld. Authorised Representative submitted at the outset that he would not be pressing grounds relating to disallowance of interest u/s.36(1)(iii) of the Act. In view of the statement made at Bar by the Ld. Authorised Representative of the assessees, ground Nos. 6 to 8 in the appeals are dismissed as 'not pressed'.

3. The facts in brief as emanating from records in these appeals are : The assessees are engaged in the business of purchase and sale of scrap from various Government organizations. During the course of scrutiny assessment proceedings the AO made addition/disallowance in the income returned by the assessees inter-alia on the ground that the assessees have made cash payments exceeding Rs.20,000/- for the purchase of scrap from MSRTC. These cash payments are in violation of the provisions of section 40A(3) of the Act.

4. Aggrieved by the assessment orders in the impugned assessment years, the assessees filed appeals in the respective cases before the Commissioner of Income Tax (Appeals). The CIT(A) upheld the findings of the AO on the issue.

Against the findings of CIT(A), the assessees filed second appeal before the Tribunal. The Tribunal vide order dated 20-05-2013 held that MSRTC is a "State" within the meaning of Article 12 of the Constitution of India, and remitted the matter back to CIT(A) for deciding the issue afresh in the light of observations made. The CIT(A) in second round of litigation again decided the issue against the assessees by placing reliance on various decisions. Hence, the present appeals.

5. Shri Sunil Pathak appearing on behalf of the assesseees submitted that the CIT(A) has erred in holding that the assesseees have violated the provisions of section 40A(3) and the payments made by the assesseees do not fall in the exceptions provided under Rule 6DD of the Income Tax Rules. In the present case, the assesseees have made cash payments on account of purchase of scrap from MSRTC, Maharashtra State Electricity Board (in short MSEB) and other Government organizations. Mainly the purchase of scrap is from MSRTC. All these State Corporations fall within the meaning of "State" under Article 12 of the Constitution of India. MSRTC was established by the State Government, as per the provisions of section 3 of the Road Transport Act, 1950. It is a State owned Transport Corporation. The entire share capital of MSRTC is funded by the State Government and Central Government. There is no public participation. The State Government has full control over the policy decisions and the management of MSRTC. As per the definition of "State" given in the Constitution, it is clear that any authority which is under the control of the Government can also be considered as part of the State. The words and phrases are to be interpreted in the manner which are widely accepted. Since MSRTC is a State owned Transport Corporation, for intents and purposes it is considered an inseparable limb of the State Government and is a 'State' as per Article 12 of the Constitution of India. In support of his submissions the Ld. Authorised Representative placed reliance on the decision of the Hon'ble Supreme Court of India in the case of Commissioner of Sales Tax Vs. Jaswant Singh Charan Singh reported as 1967 AIR 1454 SC. The Ld. Authorised Representative submitted that the Tribunal in the first round of litigation has held

that MSRTC is a “State” within the meaning of Article 12 and therefore the provisions of section 40A(3) will not apply on the cash payments made by the assessee to MSRTC.

6. The Ld. Authorised Representative further submitted that the Department, has not raised any doubt over the genuineness of the payments. The only objection raised by the Department is that there is violation of the provisions of section 40A(3) of the Act. The genuineness of the payments are not doubted by the Department, therefore, no disallowance could be made. In support of his submissions the Ld. AR placed reliance on the following decisions :

1. ITO and another Vs. K.N. Pramod reported as 328 ITR 669 (Kar.)
2. Sri Laxminarayanan Oil Mill Vs. CIT reported as 367 ITR 200 (AP)
3. Gurudas Garg Vs. CIT reported as 63 taxmann.com 289 (P&H)

7. On the other hand Shri Aseem Sharma representing the Department vehemently supported the findings of the CIT(A). The Ld. Departmental Representative submitted that the CIT(A) in a detailed and well reasoned order after considering various judgements on the issue, has rightly come to the conclusion that MSRTC is not a “State” and thus the payments made in cash to MSRTC by the assessees will fall within the purview of section 40A(3) of the Act. The Ld. Departmental Representative vehemently defended the order of CIT(A) and prayed for dismissing the appeals of the assessees.

8. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. The only issue before us for adjudication in these appeals is; Whether the payments made in cash by the assessees to MSRTC for

purchase of scrap in auction would attract the provisions of section 40A(3) of the Act ?

9. In the first round of litigation, same question was raised before the Tribunal in ITA No.845 & 1471/PN/2010, ITA No.836/PN/2010 & ITA No.1241/PN/2011, ITA No.834/PN/2010 & ITA No.1242/PN/2011, ITA No.1472/PN/2010. The Tribunal vide consolidated order dated 20-05-2013 had remitted the issue back to the file of CIT(A) for deciding it afresh in the light of the observations made. The relevant extract of the observations made by the Tribunal are as under :

“10. We are unable to accept the argument canvassed by the Ld. DR. The Article 12 of the Constitution reads as under:

“the state includes the Government and Parliament of India and Government and the Legislature of the states and all local or other authorities within the territory of India or under the control of the Government of India.”

11. The definition of the State under Article 12 has come for the consideration on number of occasions before the Hon'ble Supreme Court. The State consists of three departments, the Legislature, the Executive and the Judiciary. We need not go into all the limbs of the State as only the limited issue before us is whether the term Government used in clause (b) to Rule 6DD includes even the autonomous bodies which partakes the character of instrumentalities of the Government. The core test to be applied whether a particular Corporation which is autonomous body is a part of Government, to be seen in the context of degree of control over management and policy decisions. We find that in the case of MSRTC as per the certificate of the share capital filed before us, the entire share capital is contributed by the State Government and the Central Government and there is no private participation. We further find that MSRTC is incorporated under special legislation i.e., Road Transport Corporation Act, 1950. We have examined the provisions of the said enactment. As per section 5 of the said Act, the State Government is only having power to appoint the Chairman and other Members in the Managing body. There is a full control of the State Government on the policy decisions as well as management. In our opinion, if we apply the test of the control and management as well as the equity participation, MSRTC is a State within Article 12 of the Constitution. Applying the above test, the Hon'ble Supreme Court has held, as discussed hereinabove, that the autonomous bodies like State Road Transport Corporation or Warehousing Corporation where there is a full control by the

Government, either Central or State, these are the instrumentalities of the Government only.

12. The term Government is very much wide under the constitutional set up. Government may be Central or State, or it may be Local Government which is envisaged by our Constitution, like Zilla Parishad, Municipal Corporations, Municipal Councils, Panchayat Samithis, etc. The Public Works Department is part of the Government. In our opinion, this aspect has not been considered by the authorities below and they have closed door to the assesseees to make out the case for examination under Rule 6DD. We are, therefore, of the opinion that in the light of our above discussion, the plea of the assesseees need reconsideration by the Ld. CIT(Appeals). We, therefore, set aside the issue in respect of the disallowance made u/s.40A(3) to the file of the Ld. CIT(A) to decide the same de novo in the light of our above observations and discussion. Accordingly, the relevant Grounds taken by the assesseees in all these appeals are allowed for statistical purposes. Needless to say the CIT(A) is directed to give opportunity of being heard to the assesseees as per the principles of natural justice.”

10. A bare perusal of Article 12 shows that the definition of “the State” given in Article is inclusive and not exhaustive. “The State” includes :

- (a) the Government and Parliament of India;
- (b) the Government and the Legislature of each of the States;
- (c) all local and other authorities within the territory of India; and
- (d) all local and other authorities under the control of the Government of India.

11. The expression “other authorities” used in Article 12 is neither defined in the Constitution of India nor in any other statute. Therefore, the Hon’ble Supreme Court of India and the Hon’ble High Court have interpreted this expression in various judgements. The Hon’ble Supreme Court of India while interpreting the expression “other authorities” in the case of Som Prakash Rekhi Vs. Union of India reported as AIR 1981 SC 212 have culled out certain tests to determine as to when a Corporation should be said to be an

instrumentality or Agency of the Government. The tests laid down by the Hon'ble Apex Court are summarized as under :

- “1. If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
2. Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
3. Whether the Corporation enjoys monopoly status which is State conferred or State protected.
4. If the functions of the corporation are of public importance and closely related to governmental functions. It would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.
5. If a department of a Government is transferred to a corporation, it would be a strong factor supporting this inference of the corporation being an instrumentality or agency of the Government.”

After applying the cumulative effect of all the relevant factors mentioned above, if the body is found to be an instrumentality of the agency of the Government, it would be an authority included in term “State” under Article 12 of the Constitution of India. However, the tests indicated by the Hon'ble Apex Court in the case of Som Prakash Rekhi are merely indicative and not absolute and thus, have to be applied discretely. If any body or organisation falls within the criteria as laid down by the Hon'ble Apex Court it can be considered that it falls within the term “State”.

12. If these tests are applied on the MSRTC, we observe that the Corporation satisfies majority of the conditions. The entire share capital of MSRTC is owned by State and Central Government. The State has full control over the working, policies and the framework of the Corporation. The Corporation is providing public transport facility to the subjects of the State, even in for remote areas, where

sometimes it is not economically viable to provide transport service. Thus, it is providing vital function of public importance.

13. The Hon'ble Bombay High Court in the case of Maharashtra State Road Transport Corporation Vs. Diwakar Madhukarrao Malkapure and Others in Writ Petition No.2762/2012 decided on 12-11-2013 while dealing with an issue relating to payment of compensation to one of the employee of MSRTC has observed as under :

“The Petitioner employer is a body Corporate and is State within the meaning of Article 12 of the Constitution of India and therefore it has to act as a Model Employer.”

14. Thus, in view of the facts of the case and in the light of observations of the Hon'ble Bombay High Court, we are of the considered opinion that the CIT(A) has erred in holding that MSRTC is not a “State” and cash payments made to MSRTC are hit by the provisions of section 40A(3) of the Act.

15. In so far as genuineness of the payments to MSRTC by the assessee, they are not disputed by the department. Once it has been held that MSRTC is a “State” within the meaning of Article 12 of the Constitution of India, the payments cannot be disallowed u/s.40A(3). The provisions of Rule 6DD would protect the assessee from such disallowance. The assessee has explained that cash payments have been made to MSRTC on successful bid of scrap auction. The payments are made in cash immediately to guard against the pilferage of scrap. Thus, cash payments are also made out of business expediency. Therefore, in our considered view, no

disallowance can be made u/s.40A(3) in the facts of the present case.

16. Our view is fortified by the decision rendered in the case of Sri Laxmi Satyanarayan Oil Mill Vs. CIT (Supra). The Hon'ble High Court has held that no disallowance can be made u/s.40A(3) where genuineness of payment is not doubted. The relevant extract of the observation of the Hon'ble Court are as under :

"18. Section 40A(3) must not be read in isolation or to the exclusion of rule 6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the 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 on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources. The terms of section 40A(3) are not absolute. Considerations 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."

17. In the case of Gurudev Garg Vs. CIT the Hon'ble Punjab & Haryana High Court has held that where genuineness of transaction made in cash in excess of Rs.20,000/- was not disbelieved by the authorities, the same cannot be disallowed u/s.40A(3) of the Act.

18. In view of the facts of the case and the case laws discussed above, we are of the considered view that the provisions of section 40A(3) are not attracted on the cash payments made by the

assesseees to MSRTC. The provisions of Rule 6DD (b) provide exception to Section 40A(3) where cash payments are made to Government. The aforesaid exception will operate in the case of the assessee. Thus, the CIT(A) has erred in holding that disallowance u/s.40A(3) is to be made in respect of cash payments made by assesseees to MSRTC. The impugned orders are set aside and the AO is directed to delete the disallowing made u/s.40A(3) in the impugned assessment years. Accordingly, ground Nos. 1 to 5 raised in the appeals are allowed.

19. In the result, the appeals of the assesseees are partly allowed.

Order pronounced on Monday the 29th day of February, 2016.

Sd/-
(**R.K. PANDA**)
ACCOUNTANT MEMBER

Sd/-
(**VIKAS AWASTHY**)
JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 29th February, 2016.
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-II, Pune
4. The CIT-II, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" पुणे /
DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune