आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में।
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, 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 No. 1757/PN/2012
निर्धारण वर्ष / Assessment Year : 2008-09

G. T. Batliwala and Company,
675, Budhwar Peth,
Opp. Jogeshwari Temple,
Pune – 411002

PAN : AABFG0781B

………. अपीलार्थी / Appellant

बनाम V/s.

Income Tax Officer,
Ward – 5(4), Pune

………. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 1758/PN/2012
निर्धारण वर्ष / Assessment Year : 2008-09

Nandkumar Bottle Trading Company,
644, Budhwar Peth,
Opp. Jogeshwari Temple,
Pune – 411002

PAN : AAAHN5623C

………. अपीलार्थी / Appellant

बनाम V/s.

Income Tax Officer,
Ward – 5(4), Pune

………. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 1759/PN/2012
निर्धारण वर्ष / Assessment Year : 2008-09

Poona Bottle Trading Company,
644-A, Budhwar Peth,
Opp. Jogeshwari Temple,
Pune – 411002

PAN : AABFP4663K

.... अपीलार्थी / Appellant

बनाम V/s.

Income Tax Officer,
Ward – 5(4), Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by	: Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Department by	: Shri B.C. Malakar
सुनवाई की तारीख/ Date of Hearing	:20-05-2015
घोषणा की तारीख /Date of Pronouncement	:20-07-2015

आदेश / ORDER

PER VIKAS AWASTHY, JM:

The appeals have been filed by the assessees impugned the order of Commissioner of Income Tax (Appeals)-III, Pune for the assessment year 2008-09 in their respective cases. All the impugned orders are dated 22-02-2012.

2. In appeals, the assessees have assailed the confirming of disallowance Rs.96,35,820/- u/s. 40A(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") in each case. Since, all the appeals are by the assessees from same group, having identical facts the appeals are taken up together for adjudication.

3. The brief facts of the case as emanating from records are : A survey action u/s. 133A of the Act was carried out on the group concerns i.e. M/s. G.T. Batliwala and Company, M/s. Nandkumar Bottle Trading Company and M/s. Poona Bottle Trading Company on 14-03-2008. During the course of survey proceedings two note books were impounded by the Department. Statements of Shri Nandkumar Ganpat Shewale, Karta of HUF, Shri Rajendra Ganpat Shewale, partner in M/s. G.T. Batliwala and Company and Shri Mukund Ganpat Shewale, partner in M/s. Poona Bottle Trading Company were recorded on 14-03-2008. The main issue raised at the time of survey and during the course of scrutiny assessment was the cash payments made by the group concerns in excess of Rs.20,000/- for purchasing empty bottles.

3.1 The assessees are engaged in the business of trading in empty second hand liquor bottles. The assessees purchased bottles from hawkers and sell the same after sorting and washing to the Breweries on wholesale basis. The assessees purchased bottles from hawkers against cash payments. During the course of survey proceedings, two note books were impounded. The examination of note books revealed that the assessees had made cash payments to various persons on several occasions in excess of Rs.20,000/-. The assessees explained that the notings recorded in the books are rough notings that have no concern with day-to-day transactions. The notings represent 'likely purchases' in the future from a particular vendor and not the actual payments. The Assessing Officer did not accept the contentions of the assessees and made disallowance of Rs.96,35,820/- in the hands of each assessee.

Aggrieved by the assessment orders, the assessees filed appeals before the Commissioner of Income Tax (Appeals). The Commissioner of

Income Tax (Appeals) dismissed the appeals of the assessees vide separate orders of even date.

Now, the assessees have come in appeal assailing the findings of the First Appellate Authority. Since, the facts in all the cases are similar, identical grounds have been raised by the assessees in their respective appeals, which are as under:

1) *The learned CIT(A) erred in confirming the disallowance of Rs.96,35,820/- u/s. 40A(3) made by the A.O.*

2) *The learned CIT(A) erred in holding that the assessee had made cash purchases which were evident from the note books found during the course of survey and therefore, the disallowance u/s 40A(3) is required to be made.*

3) *The learned CIT(A) failed to appreciate that the assessee had not made any purchases in cash in excess of Rs.20,000/- and therefore, there was no question of making any disallowance u/s 40A(3).*

4) *The learned CIT(A) erred in not admitting the additional evidence in the form of confirmations from the group leaders of the hawkers during the" appellate proceedings without appreciating that there was reasonable cause on the part of the appellant in not submitting these evidences during the asst. proceedings.*

5) *The learned CIT(A) erred in holding that –*

   a. *The entries in the impounded note books were actual cash purchases made by the assessee.*

   b. *The entries made in the books show that the payments were made directly to the persons whose names appear in the books and not to the individual hawkers.*

   c. *The persons whose names appeared in the impounded note books were themselves traders in bottles and hence, the assessee had made the cash payment directly to the said persons and not to individual hawkers.*

   d. *The assessee had been offered ample opportunity to substantiate his claim during the asst, proceedings and hence, the admission of additional evidence during the appellate proceedings was invalid.*

6) *The learned CIT(A) erred in not appreciating that –*

a. *The figures noted in the note books found during the course of survey did not indicate actual payments made to the hawkers but were the tentative figures required for making the purchases and hence, there was no question of making any addition on the basis of the notings made in the note books found during the course of survey.*

b. *The names noted in the note books were not of the hawkers but of the group leaders who arranged the hawkers and the actual payments are made by the assessee directly to the hawkers which are always less than Rs.20,000/-.*

c. *The entries in the books of accounts clearly indicated that each payment to individual hawker was less than Rs.20,000/- and accordingly, the disallowance made u/s 40A(3) is not justified.*

d. *The assessee was not afforded a reasonable opportunity to produce the evidence in the form of confirmations of the group leaders during the asst. proceedings and hence, the same should have been admitted as additional evidence to promote the cause of justice.*

4. Shri Nikhil Pathak appearing on behalf of the assessee submitted that the assessees are in the business of purchasing old liquor bottles from small and petty hawkers. These hawkers are mostly illiterate and do not have bank accounts. These hawkers are working in an unorganized sector, therefore, it is difficult to track or trace them. The purchases made from these hawkers are always below the threshold limit of Rs.20,000/- and all the purchases made from them are supported by vouchers. The amounts mentioned in the note books which were impounded during survey proceedings are dully accounted in the books of account of the assessees. The Revenue authorities have disbelieved the contentions of the assessees without properly appreciating the facts. The ld. AR of the assessees referred to the photocopy of 'Mahalaxmi note book at pages 5 to 88 of the paper book. The ld. AR pointed out that a perusal of note book shows that all the payments are made in round figures. The ld. AR further submitted that the assessees had obtained confirmation letters from some of the persons through whom these second hand liquor bottles were purchased but the authorities below did not consider the same and made no effort to verify the fact from the persons giving

confirmation letters. The assessment order has been passed on assumptions and presumptions. The ld. AR prayed for deleting disallowance made u/s. 40A(3) of the Act.

5. On the other hand Shri B.C. Malakar representing the Department vehemently supported the impugned orders of Commissioner of Income Tax (Appeals) in the cases of respective assessees. The ld. DR submitted that in the impounded note books, the assessees have recorded exact figures of the payments made in cash for purchasing second hand bottles. The stand of the assessees before the authorities below is that the figures represent 'likely purchases'. The ld. DR further submitted that it is highly improbable that somebody will make notings of 'likely purchases' that to in odd figures and with particular dates. The ld. DR referred to the statements recorded during survey proceedings u/s. 133A. The ld. DR referred to Q. Nos. 15 and 16 wherein the assessees have admitted that no payments were made to any trader above Rs.20,000/- in a day. The assessees have further admitted the fact that note books nos. 1 and 2 contain rough notings which have no concern to the day-to-day transactions. The ld. DR pointed out that a bare reading of the statement and the stand taken by the assessees before the authorities below show that they are not in harmony. The assessees have been changing stand. Initially the assessees submitted that notings made in note books are rough. Subsequently, the assessees admitted that these are the purchases which are dully recorded in the books of account. The ld. DR prayed for dismissing the appeals of the assessees and confirming the order of Commissioner of Income Tax (Appeals).

6. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. We have also

examined the documents placed on record by the ld. AR of the assessee in the form of paper book and relied upon during the course of hearing. It is an undisputed fact that the assessees have been purchasing second hand bottls from hawkers against cash payments. It is also an undisputed fact that the hawkers through whom the assessees are purchasing old bottles are working in an unorganized sector. During the course of search two note books were impounded by the Department. An examination of these note books revealed that in some of the cases the payment made by the assessees to a single person on a day exceeded Rs.20,000/-. The assessees refuted the stand of the Department that such amount represents cash purchases. The stand of the assessees is that the figures pointed out by the Department are 'likely purchases' and do not reflect actual cash purchases. The Assessing Officer rejected the contentions of the assessees and made disallowance of Rs.2,89,07,460/- u/s. 40A(3), (Rs.96,35,820/- in the case of each assessee being 1/3rd share).

7. A perusal of statement of Shri Nandkumar Ganpat Shewale, Karta of HUF recorded u/s. 131 on 14-03-2008 shows that in reply to Q. No. 4 he has admitted that the payments are made in cash to the traders from whom the bottles are purchased. Further, in reply to Q. No. 15 he has stated that no payments above Rs.20,000/- has been made to any trader on a single day. In reply to Q. No. 16 he has admitted that notings in note books no. 1 and 2 contain rough notings and has no concern with the day-to-day transactions. The relevant extract of the statement of Shri Nandkumar Ganpat Shewale is reproduced here-in-below:

> *"Q. 15 – Have you purchased empty bottles costing Rs.20,000/- at one stroke in a single day? Or have you paid above Rs.20,000/- in one day to a trader?*
>
> *Ans. – No, we have not made any payment above Rs.20,000/- in any trader.*

Q. 16 – During the course of Survey proceedings at your premises, 2 notebooks were found and impounded. You are requested to go through the same and explain the contents of the same.

Ans. – Notebooks No.-1 contains rough noting which has no concern to the day-to-day transactions. Notebook No.-2 also contains as in notebook No.-1.

xxxxxxxxxx

Q. 19 – It is mentioned in your answer to Q. No.-15 that you have purchased empty bottles costing less than Rs.20,000/- at a time, whereas, the notebooks impounded shows that you have paid amount exceeding Rs.20,000/- many a times, what you have to say in this regard?

Ans. – These noting are noting but likely purchases which are to be made from different parties.

Q. 20 – Since many entries are in odd figures. Do you agree that these are purchases to be made in future?

Ans. – Yes, these are likely purchases from the above parties.

xxxxxxxxxx

Q. 26 – In Page No.-3, you have written Rs.1,20,000/- against Bagnikar, Rs.60,000/- against Rama, Rs.1,20,000/- against D. Gupta, Rs.80,000/- against Attar can you identify these parties?

Ans. – No, I cant identify these parties.

xxxxxxxxxx

Q. 34 – Is it correct that you have split the above transactions below Rs.20,000/- to circumvent the provisions of Sec. 40A(3).

Ans.- As I said earlier these are not pertaining to my normal transactions, I have not entered these transactions in my regular books of accounts."

Statements of Shri Mukund Ganptat Shewale and Shri Rajendra Ganptat Shewale were also recorded on 14-03-2008. Their answers to the queries raised by the Department were on identical lines.

8. The stand of the assessees before the authorities below is that the notings in the note books impounded during survey are rough notings which have no concern with day-to-day transactions. A perusal of answers to Q. No. 34 shows that the assessee has admitted that the transactions recorded in books does not pertain to normal transactions and have not been entered in the regular books of account. However, we find that the assessees have been taking contradictory stand. On the one hand the assessees are trying to run away from the notings made in the impounded note books by stating that they have no concern with the day-to-day transactions, on the other hand, the assessees are referring to various transactions recorded in the same note books and admitting that the transactions are fully accounted in the books of account of the assessees. The assessees cannot be allowed to approbate and reprobate on the notings made in the impounded note books.

9. The ld. AR of the assessees has reiterated before us that the payments in cash are made to small times hawkers who are in unorganized sector. Most of them live in slums and do not have any bank account. They mostly work in groups and the deals are finalized through their group leaders but the payments are made to the individual hawkers. The amounts recorded in odd figures in the seized note books are 'likely purchases' from the hawkers. However, on examination of the documents on record, the submissions made by the assessees fail to inspire confidence. The Commissioner of Income Tax (Appeals) has given categoric findings that the note books seized contains entries with respect to regular banking transactions along with the 'likely purchases' as purported by the assessees. The banking transactions recorded in the note books corroborate with regular books of account of the assessees.

When the assessees are recording banking transactions in the note books on actual basis there is no reason for recording 'likely purchases/future purchases' in the same note books that too in odd figures. Thus, the contention of the assessees that the note books does not contain actual transactions is not tenable.

10. In order to substantiate it's claim, the assessee placed on record purchase bills and vouchers in the name of 35 traders/hawkers. The Assessing Officer observed that there are no signatures or stamp on those vouchers. Even the narrations in all the 35 vouchers are exactly the same. The Assessing Officer further observed that it is surprising that thirty-five people i.e. small traders / hawkers approached the assessees on the same day and all of them brought same type of empty bottles 180 ml for sale and not a single bottle out of 32,250 bottles was of any other type / quality. All the payments vouchers range between Rs.14,980 to Rs.19,980/-. This clearly shows that the vouchers were deliberately made within the threshold limit of Rs.20,000/- to circumvent the provisions of the Act.

11. The Commissioner of Income Tax (Appeals) while dismissing the appeals of the assessees observed as under:

> *"3.3.4 Even otherwise, as already discussed, the evidences found during the survey clearly show that the payments were made to the persons, whose names figure in the note books, towards actual purchases of empty bottles from them and not to the individual hawkers directly. When such clinching evidences were found during the survey indicating cash purchases exceeding Rs.20,000/- in each case, it goes without saying that mere production of confirmation letters does not discharge the liability of the appellant to substantiate its claim of likely purchases or payments directly to hawkers. The onus of very high degree is on the appellant to produce cogent and reliable evidence to demonstrate that the apparent in the impounded note books is not the real. But the appellant, except filing four self-serving confirmations, failed to demonstrate with reliable evidence that the apparent in the impounded note books is not the real. Admittedly, the appellant neither maintained quantitative details of stock nor party wise purchases in the regular books of account. In such a situation, when the*

other materials and documents produced by the appellant do not lead to a proper, reasonable or acceptable explanation as regards the nature of entries in the note books, the Assessing Officer is perfectly entitled to consider the nature of the entries as they appear in the note books. Further, when there is no ambiguity in the entries recorded in the note books that they represent actual cash purchases made by the appellant and its associate concerns, no purpose would be served by examining the persons, whose names appear in the impounded note books. Even presuming for a while that the amounts were directly paid to the individual hawkers and the group leaders are only facilitators in the process of making purchases of empty bottles and scrap by the appellant as claimed, the persons are normally compensated for the alleged services. But surprisingly, as mentioned in the confirmation letters, no commission or brokerage or incentive was paid by the appellant to the group leaders for the alleged services. On the contrary, the claim of the group leaders in the confirmations is that they received commission from hawkers and scrap leaders after finalizing the 'deal' with the appellant. Firstly, no evidence whatsoever was produced by the group leaders to show that they received commission from hawkers and scrap dealers. Secondly, it does not stand to reason that the said persons received commission from hawkers, who are persons of small means and not from the appellant group, for the alleged services rendered to the appellant group, As pointed out by the Assessing Officer, it would appear from the entries in the note books, the persons, whose names appear in the impounded note books, were also carrying on trading of empty liquor bottles trading and they were buying the empty liquor bottles from petty hawkers or small traders and selling in-turn to the appellant and earning some profit. Thus, the subsequent confirmations of group leaders, now sought to be admitted by the appellant as additional evidence, are only self-serving and an afterthought in order to escape the consequences of sec. 40A (3) and no credence can be given to such self-serving confirmations. The decisions relied upon by the appellant were rendered in a different factual context and the same cannot be applied to the facts of the present case. This is a case where payments were made for purchases exceeding Rs.20,000/- in each case in flagrant violation of provisions of sec. 40A (3).

3.3.5 To sum up, the appellant could not substantiate its claim that the entries in the two impounded notebooks are not the actual purchases made by the group but are the 'likely purchases'. The appellant, except filing self-made vouchers and self-serving confirmations, could not prove with independent and reliable evidence that the payments for purchases of empty bottles were made to the hawkers directly and not to the persons mentioned in the note books. In such a scenario, the Assessing Officer is perfectly justified in holding that the entries in the impounded note books represent the actual purchases made by the appellant and its sister concerns during the year under consideration. Since the amount paid in each case exceeded Rs. 20,0007- as clearly recorded in the note books, the provisions of Sec. 40A (3) of the I. T. Act are attracted to the impugned payments. Accordingly, the addition of Rs.96,35,820/- made by the Assessing Officer on account of disallowance of impugned expenditure under sec. 40A(3), being 1/3 of aggregate cash payments exceeding Rs. 20,000/- in each case, does not call for any interference and the same is upheld."

12. The ld. AR has not been able to controvert the above findings of the Commissioner of Income Tax (Appeals). The contentions of the assessees that the Commissioner of Income Tax (Appeals) has not considered the confirmations filed are also fallacious. The Commissioner of Income Tax (Appeals) has considered the same and has thereafter rejected the same being self serving in nature. The orders of Commissioner of Income Tax (Appeals) are well reasoned and detailed. We do not find any reason to disturb the same. The impugned orders are confirmed and the appeals of the assessees are dismissed being devoid of any merit.

Order pronounced on Monday, the 20th day of July, 2015
at Pune

Sd/-	Sd/-
(आर. के. पांडा / R.K. Panda)	(विकास अवस्थी / Vikas Awasthy)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

पुणे/Pune; दिनांक/Dated : 20th July, 2015
RK/PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील)/ The CIT(A)-III, Pune
4. आयकर आयुक्त /The CIT-III, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच, पुणे / DR, ITAT, “B” Bench, Pune
6. गार्ड फाईल /Guard file.

//सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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