

आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “SMC”, PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM

आयकर अपील सं. / ITA No.400/PN/2015

निर्धारण वर्ष / Assessment Year : 2011-12

The Income Tax Officer,

Ward 1(3), Jalna

.... अपीलार्थी/Appellant

Vs.

M/s. Mahalaxmi & Company,

1-34-142, Sindhi Bazar,

Jalna.

.... प्रत्यर्थी / Respondent

PAN: AAQFM4338R

अपीलार्थी की ओर से / Appellant by : Smt. Sumitra Banerji

प्रत्यर्थी की ओर से / Respondent by : None

सुनवाई की तारीख / Date of Hearing : 26.10.2016	घोषणा की तारीख / Date of Pronouncement: 11.11.2016
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This appeal filed by the Revenue is against the order of CIT(A)-I, Aurangabad, dated 08.01.2015 relating to assessment year 2011-12 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised the following grounds of appeal:-

1. *Under the fact and circumstances of the case the learned CIT(A) erred in granting the benefit of exceptions under rule 6DD(j) when in fact the case of the assessee does not fall under the exceptions specified under Rule 6DD(j) of the Income-tax Rules, 1962.*
2. *Under the facts and circumstances of the case the learned CIT(A) overlooked the fact that credit was being made available to the assessee by the two parties to whom cash payments were effected, and that the assessee himself had been making payments by cheques / demand drafts to them.*
3. *Under the facts and circumstances of the case the learned CIT(A) failed to appreciate that there were no business exigencies existing to make the payments in cash and specially when such cash payments were being made in a series of transactions and not by way of solitary transactions.*
4. *Under the facts and circumstances of the case the CIT(A) failed to appreciate that granting relief in such cases would be defeating the intent of legislature in bringing the provision on the statute book itself.*
5. *Considering the facts and circumstances of the case, the Learned CIT(A), Aurangabad failed to appreciate the fact that the provisions of Section 40A(3) of the Income-tax Act, 1961 were squarely applicable in the instant case under appeal.*
6. *Considering the facts and circumstances of the case, the Learned CIT(A), Aurangabad was not justified in deleting the addition of Rs. 38,59,820/- on account of disallowance under section 40A(3) of the IT Act, 1961 in the hands of the assessee.*
7. *On the facts and circumstances of the case, the CIT(A) Aurangabad's order be vacated and that the order of the Assessing Officer be restored.*

3. Despite service of notice, none appeared on behalf of the assessee nor any application was moved for adjournment. However, on perusal of grounds of appeal, it transpired that the issue is covered by the order of Tribunal in related case.

4. The learned Departmental Representative for the Revenue was asked to produce the said order and the matter was heard on the next date of hearing.

5. The issue arising in the present appeal is against the disallowance made under section 40A(3) of the Act amounting to Rs.38,59,820/-.

6. Briefly, in the facts of the case, the assessee had furnished the return of income declaring Nil income. The case of the assessee was selected for scrutiny and notices were issued to the assessee. In response to which, the assessee produced the computerized books of account including purchase and sale bills, etc. The assessee was a registered firm, which was engaged in trading Mobile recharge vouchers, Sim-cards, Tata Sky, etc. on wholesale basis. The Assessing Officer on verification of ledger relating to 4% purchase of recharge vouchers noted that the assessee had made total purchases during the year under consideration at Rs.1.62 crores, which was debited to the Trading Account. Out of total purchases of recharge vouchers and Sim-cards at Rs.1.62 crores, sum of Rs.1.27 crores pertained to the purchases for the period 01.10.2010 to 31.03.2011, which was made by the assessee from various companies. The Assessing Officer further noted that the assessee had made substantial purchases in cash ranging between Rs.19,000/- to Rs.20,000/- from Om Agencies, Jalna and Shree Enterprises, Jalna respectively. The Assessing Officer verified the cash purchases made by the assessee from the books of account and the assessee was found to have made purchases of Rs.24,03,824/- from Om Agencies, Jalna and Rs.14,55,996/- from Shree Enterprises, Jalna in cash. The assessee was found to have made aggregate payments to the said concerns in a day otherwise than by an account payee cheque drawn on bank or account payee bank draft exceeding Rs.20,000/-. Therefore, the assessee was asked to explain as to why the said amounts should not be disallowed under the

provisions of section 40A(3) of the Act. In response, the assessee contended that the said payments in cash were made due to business exigency. The assessee explained its *modus operandi* by way of written submissions, which are incorporated under para 6 at pages 3 to 5 of the assessment order. The Assessing Officer did not accept the contentions of assessee since the purchases were made by the assessee at Jalna, where established banking facilities for both the assessee and the seller were available. Further, both the parties were having number of bank accounts which were in operation. The Assessing Officer also noted that the assessee had made purchases from various other parties based at Jalna and other districts of Maharashtra, by making the payments through banking channel either by cheques or demand draft and RTGS, etc. The Assessing Officer also noted that the assessee had made purchases from Om Agencies, Jalna and Shree Enterprises, Jalna on credit to the extent of Rs.2,85,429/- and Rs.3,59,832/- respectively and made the payments through banking channels. The contention of assessee that the demand draft was refused by the seller was held to be beyond any stretch of imagination and in respect of other reasons, in the absence of any iota of evidence that the said parties demanded payments in cash, the Assessing Officer dismissed the same. Since the assessee had made cash payments in contravention of provisions of section 40A(3) of the Act, sum of Rs.38,59,820/- was disallowed.

7. The CIT(A) held that where the recharge vouchers were sold by the assessee who was wholesaler to the retailers and where the price of recharge was fixed by BSNL and the dealers / distributors / wholesalers were entitled to meager commission at minimum percentage, the impugned transactions could

not be regarded as that of incurring purchase expenditure and hence, it was held that no disallowance was warranted under section 40A(3) of the Act.

8. The Revenue is in appeal against the order of CIT(A).

9. The notice for hearing along with Appeal Memo was sent to the assessee and the same has been returned back by the postal authority. No other address for communication is available on record and in view of the issue being covered the appeal is heard *ex parte* the assessee.

10. On perusal of record and the orders of authorities below, it is apparent that the issue arising in the present appeal i.e. disallowance made under section 40A(3) of the Act on account of the payments made by the assessee for purchase of Mobile recharge vouchers is squarely covered by the order of the Pune Bench of Tribunal in Doshi Vijaykumar Motilal Vs. ITO in ITA No.74/PN/2014, relating to assessment year 2008-09, order dated 10.06.2014. The Tribunal in turn had relied on the ratio laid down by Cochin Bench of Tribunal in S. Rahumathulla Vs. ACIT (2010) 127 ITD 440 (Cochin). The relevant findings of the Tribunal are as under:-

"7. We have carefully considered the rival submissions. In the present case, assessee is an individual who has undertaken dealings in mobile recharge vouchers on a wholesale basis. During the year under consideration, assessee made purchases of mobile recharge vouchers from M/s Aircare Engineers (I) Pvt. Ltd., Pune for a total sum of Rs.62,23,541/-. As per the Assessing Officer, payments to the extent of Rs.54,79,648/- made by the assessee to M/s Aircare Engineers (I) Pvt. Ltd., Pune to effect the aforesaid purchases, were in contravention of section 40A(3) of the Act. Notably, section 40A(3) of the Act prescribes that no deduction shall be allowed in respect of an expenditure for which payment is made to the other person otherwise than by way of an account payee cheque drawn on a bank on an account payee bank draft, in all cases where the amount exceeds Rs.20,000/-. The case of the Revenue is that the payments of Rs.54,79,648/- made by the assessee to M/s Aircare Engineers (I) Pvt. Ltd., Pune are made otherwise than by an account

payee cheque drawn on a bank or an account payee bank draft, and therefore, the aforesaid sum is disallowable in terms of section 40A(3) of the Act.

8. In this context, the decision of the Cochin Bench of the Tribunal in the case of *S. Rahumathulla (supra)* has been relied upon by the appellant before us. In the case before the Cochin Bench, issue related to invoking of section 40A(3) of the Act in the case of assessee who was, inter-alia engaged in dealing in BSNL and other telephone cards. The payments made by the assessee towards purchases of Telephone cards were by way of cash which was sought to be disallowed by the Assessing Officer by invoking section 40A(3) of the Act. The Cochin Bench of the Tribunal, by following its earlier decision in the case of *Vodafone Essar Cellular Ltd. vs. ACIT, (2009) 32 SOT 280 (Cochin)*, came to conclude that in such like transactions, there was only a relationship of a principal and agent and therefore, there was no question of any purchase being effected by the latter and accordingly the Bench concluded that there was no question of allowance of any expenditure in respect of purchases qua which the provisions of section 40A(3) of the Act could apply, irrespective of the mode of payments. The following discussion in the order of the Tribunal is relevant :-

“4.1 We would firstly deal with the case law cited by the assessee, as if its case is covered by the principles laid down there-under, it would stand to succeed. In the case of *Eastern Condiments Pvt. Ltd. (supra)*, the assessee found favour with the Hon'ble jurisdictional High Court in view of the provision of rule 6DD(j) of the Rules, which provided that where the assessee satisfied the Assessing Officer that the payment(s) could not be made by crossed cheque drawn on a bank or a crossed bank draft due to exceptional or unavoidable circumstances or because the payment in the manner aforesaid was not practical, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof, also furnishing evidence to the latter's satisfaction as to the genuineness of the payment and the identity of the payee, the assessing authority had the discretion to allow the expenditure, even where there was an apparent violation of the provision, so that the Revenue's appeal contesting the order of the Tribunal stood dismissed by the Hon'ble Court.

At this stage, it would be relevant to point out that section 40A(3) has undergone material changes vide amendments per the Finance Act, 1995 w.e.f. 1/4/1996 and Finance Act (No.2), 1996 w.e.f. 1/4/1997. Vide the said amendments, firstly, the threshold limit qua each individual payment, i.e., for the applicability of the section, stood enhanced from rupees ten thousand to twenty thousand. Secondly, the extent of disallowance under the section, which was earlier mandated at 100% or the whole of the impugned expenditure, stood restricted to a fraction (20%) thereof. Rule 6DD of the Rules, specifying the saving circumstances, the existence of which would eschew application of the section, stood also amended; the extant clause (j) concerning itself with the payment of salary to an employee working on a ship under certain defined circumstances. The same, clearly, has no bearing to the earlier clause (j), or relevance to the assessee's case. Circular (# 717 dated 14/8/1995) issued by the CBDT, explaining the amendments effected vide Finance Act, 1995, including to s. 40A(3) of the Act, clarified that with the banking services having taken root even in rural areas, the accentuating circumstances providing exception to the rigour of s. 40A(3) in genuine and bona fide cases per r.

6DD(j) was no longer considered utilitarian or necessary. Besides, the provision r/w r. 6DD(j) had given rise to substantial litigation arising out of the interpretation and scope of these provisions. Perhaps, the Legislature was of the view that it was difficult to establish the mitigating circumstances of the payments, so that where the genuineness is not in doubt, it would suffice if a fraction thereof is deemed as an inflation in the claimed expenditure with reference to the mode of its payment, and disallowance effected on that basis. The same thus impacts the character of the disallowance or of the proscription mandated thereby inasmuch as the genuineness of the payment was no longer in issue or relevant for the purpose of the disallowance, which, as against the entire payment earlier, stood restricted to a fraction thereof. The amended extant law, thus, is cast more as an absolute rule; the exceptional circumstances having been enlisted under rule 6DD, and is in the nature of a deeming section, with the law prescribing disallowance with reference to the mode of payment of the concerned expenditure rather than with reference to the expenditure itself, deeming an inflation therein where the payment is not affected per the prescribed mode, while the genuineness of the payment, where impugned, would warrant disallowance of the entire expenditure. In fact, per a subsequent amendment to the section, the prescribed mode gets further narrowed down to account payee banking instruments only, which would facilitate tracking of the payment to any extent. Reference in this context may be profitably made to the Order by the Special Bench of the Tribunal in the case of *ITO vs. Kenaram Saha & Subhash Saha*, 301 ITR (AT) 171 (Kol.) (SB) wherein it was held as under:

"Held, that once there is payment of any expenditure in violation of section 40A(3), the assessee can escape the disallowance under the said section only if the assessee's case falls within the ambit of any of the clauses of Rule 6DD. The matter was required to be examined whether the assessee's case fell under any specific clause. Neither had the assessee properly claimed nor had the Assessing Officer examined the case with reference to the relevant rule. The orders of the authorities below were to be set aside and the matter restored to the Assessing Officer to allow adequate opportunity to the assessee to produce the necessary evidence in support of its claim and readjudicate the matter in accordance with law".

The assessment year under reference in the case of *Eastern Condiments Pvt. Ltd.* (supra), as also *Ramaditya Investments Pvt. Ltd.* (supra), was 1992-93 and, thus, the Hon'ble Courts were dealing with the provision as it stood prior to the said amendments. In the cited cases, the assesseees found favour with the Courts on the ground of genuineness of payment and the peculiar circumstances of the trade, which stood established with reference to the saving clause of Rule 6DD, as clause (j) in the case of *Eastern Condiments Pvt. Ltd.* (supra).

5. In view of the decision by the Tribunal in the case of *Vodafone Essar Cellular Ltd.* (supra), which we have sought to explain vide para 4.4 of this order, we are of the clear view that the provision of section 40A(3) would not be applicable in the facts and circumstances of the case. The earlier part of the order, which suggests otherwise, is on the premise that the 'transfer' of the cards by the service-provider to the assessee-distributor represents the latter's purchase thereof, and thus, as being only an expenditure incurred by it in the normal course of its business, meeting the arguments of the opposing parties and their

respective cases as made before us. The same is de hors the afore-said decision by the Tribunal, which stands rendered following the decisions by the Hon'ble jurisdictional High Court and the Hon'ble Apex Court on an aspect of the matter which is integral to the issue under consideration. Further, as explained earlier, once the Tribunal found the relationship between the franchisee-distributor and the service-provider to be one of Principal and Agent, there is no question of any 'purchase' by the latter, and the income arising thereto is only in the nature of a commission or remuneration against services rendered. As such, there is no question of allowance of any 'expenditure' in respect of purchases qua which section 40A(3) could apply, irrespective of the 'mode of payment' thereof. The assessee succeeds on grounds (a) to (g) of its appeal."

9. *Following the ratio of the aforesaid decision of our co-ordinate Bench and in the absence of any decision to the contrary brought out by the Revenue, we hereby hold that there is no scope for invoking the provisions of section 40A(3) of the Act in the facts and circumstances of the present case. Therefore, the disallowance made by the Assessing Officer by invoking section 40A(3) in the present case is misplaced.*

10. *Before us, the learned Departmental Representative has referred to the discussion made by the CIT(A) in para 5.2 and 5.2.1 of the order to say that the decision of the Cochin Bench of the Tribunal in the case of S. Rahumathulla (supra) is inapplicable to the controversy in the present appeal. Firstly, as per the CIT(A), section 40A(3) of the Act refers to "any expenditure in respect of which payment is made" and it does not differentiate with the nature of purchase or the goods traded or exchanged. The learned Departmental Representative has submitted that the nature of expenditure is not a determining factor to consider the application of section 40A(3) of the Act. Therefore, even if there was a relationship of the principal and agent between the assessee and the ultimate service provider of mobile SIM cards, it would not make a difference to the invoking of section 40A(3) of the Act. In our view, the aforesaid aspect of the matter has been appropriately dealt with by the Cochin Bench of the Tribunal, where reliance has been placed on the judgement of the Hon'ble Kerala High Court in the case of BPL Mobile Cellular Ltd. (supra) wherein the decision of the Hon'ble Supreme Court in the case of BSNL (supra) was followed and it was held that the value of SIM cards, recharge coupons, etc. do not represent sale of goods but was only a service rendered by the service provider which was liable to Service tax. Following the aforesaid view, the Cochin Bench of the Tribunal held that the distributor or the franchisee is all the time acting only for and on behalf of the service provider as a part of the service chain, and thus the payments made inter-se the chain only result in commission income. The relevant portion of the decision of the Cochin Bench of the Tribunal has been extracted in the earlier paras, which clearly shows that the aforesaid objection raised by the Revenue has been found to be untenable. We also hold so."*

11. The issue arising in the present appeal is squarely covered by the ratio laid down by the Tribunal in Doshi Vijaykumar Motilal Vs. ITO (supra) and the Cochin Bench of Tribunal in S. Rahumathulla Vs. ACIT (supra) and following

the same parity of reasoning, there is no merit in the grounds of appeal raised by the Revenue. Upholding the order of CIT(A), the grounds of appeal raised by the Revenue are dismissed.

12. In the result, the appeal of Revenue is dismissed.

Order pronounced on this 11th day of November, 2016.

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 11th November, 2016.
GCVSR

आदेश की प्रतिलिपि अद्योषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-I, Aurangabad;
4. आयकर आयुक्त / The CIT-I, Aurangabad;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य
मामला / DR 'SMC', ITAT, 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