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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 04.12.2012

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ITA 636/2012

R.C.GOEL

..... Appellant

Through: Dr. Rakesh Gupta with
Mr. Ashwani Taneja, Mr. Piyush Singh,
Ms. Ayushi Pareek and Mr. T.S. Talwar,
Advocates.

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. N.P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Standing Counsel.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% Issue Notice. Mr. N.P. Sahni, Sr. Standing Counsel accepts notice on behalf of Revenue.

2. ADMIT. With consent of counsel for the parties, the appeal is heard finally.

3. The question of law which arises for consideration in this case is “whether the ITAT erred in confirming the disallowance of expenditure to the tune of Rs.27, 48, 860/- made by the AO under Section 40A (3)?”



4. The brief facts of the case are that the assessee is a mobile railway catering contractor. It serves the passengers on trains and also derives income from two hotels. For the concerned assessment year i.e. AY 2008-09, it declared total income of Rs.13,10,566/-. The matter was selected for scrutiny assessment. The AO noticed that the assessee had purchased goods and supplies to the tune of Rs.27,48,860/- from one M/s Shruti Enterprises, a Mumbai-based concern for providing it supplies in the trains which it serves, i.e., Punjab Mail and Pushpak Express. The assessee had urged that purchases from this concern were necessary because one of the trains never touched Delhi and the other train used to halt at Delhi for a limited time. Consequently, it was not possible to load the stock within the short period, necessitating purchase and loading the stock in Mumbai. It was also urged that the Mumbai supplier i.e. M/s Shruti Enterprises insisted for payment in cash against delivery of items and the assessee, having regard to the nature of its contract with the IRCTC was bound to supply the goods and articles in the trains in a short time and also make payments in cash in order to maintain supplies. It had been urged by the assessee that these transactions were genuine and *bona fide* and had to be taken out of the scope of Section 40A (3). This contention, however, was turned down and the amount was added back. The assessee's appeal to the Commissioner and further to the ITAT were unsuccessful.

5. It was argued on behalf of the assessee by placing reliance on the appointment letters of those who actually sold articles on its behalf that the very nature of the business was such that customers who purchased the articles paid in cash and that the replenishment and supplies to the customers had to be made in a timely manner. The assessee urged that M/s Shruti



Enterprises used to insist on payments in cash for the supplies effected by it. Consequently, counsel relied upon Rule 6DD (k) to urge that this was a case falling within the proviso to Section 40A (3) as the payment was made in view of business expediency.

6. Counsel for the Revenue urged that the object behind Section 40A (3) was public interest and that any payment in excess of Rs.20,000/- had to be made through account payee cheques. A particular business transaction adopted by the assessee or any other did not admit of any exception to this principle. Counsel urged in this context that the case of the assessee was not covered by Rule 6DD (k) and consequently, it could not be argued that supplies would not have been obtained except on cash payments. It was submitted that if cases like the present are permitted and the disallowance is deleted, it would have implications as similar arguments of business expediency would be taken in other cases.

7. The Tribunal while rejecting the assessee's contentions held as follows: -

“14. We have heard the rival submissions of both the parties and have gone through the material available on record. We find that assessee's business is surely of a peculiar nature of supplying goods on running trains originating from Mumbai while assessee himself sitting in Delhi. In the modern age there are number of methods available for making payments throughout the country while sitting any wherein India. The argument taken by the Ld AR before us and before Ld CIT (A) regarding applicability of clause (k) of Rule 6DD do not find merit in view of the fact that the appointment of authorized person seems to be an afterthought which is apparent from the fact that on page 30 in respect of appointment of Mr. Anoop Kumar the compensation in figure is Rs.5500/- whereas in words it is Rs.7000/- which shows the negligence in



preparation of appointment letters. Moreover, the stamp paper on which indemnity bond is executed do not contain the back side so as to verify the date of purchase of stamp paper. Moreover, these were filed before the Ld CIT (A). Had there been any truth about these appointments, these could have been easily filed before the Assessing Officer as sufficient opportunities were given to assessee. Therefore, in our view, these documents do not contain any force and therefore the case of the assessee is not covered by clause (k) of Rule 6DD. However, as regards payments made on Sundays and other public holidays as per detail at page 29, we are of the opinion that this aspect may be checked by the Assessing Officer and if found correct, the disallowance may be reduced by this amount of Rs.7,23,819/-.”

Section 40A (3) to the extent it is relevant is reproduced below: -

“3) Where the assessee incurs any expenditure in respect of which 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, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

(3A) Where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceeds twenty thousand rupees:

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, exceeds twenty 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”

8. The proviso which was introduced in the year 1999 has remained constant except in the year 2005 when sub-section (3A) was introduced by the Parliament. However, Rule 6DD which was introduced and has been existing on the statute for the nearly two decades has been amended from time to time. Rule 6DD (k) to the extent it is relevant reads as follows: -

6DD. No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3A) of section 40A 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, exceeds twenty thousand rupees in the cases and circumstances specified hereunder, namely: -

XXX

XXX

XXX

(k) Where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such persons.”

9. In the present case, the previously noted discussion would reveal that the assessee engages itself in executing catering contracts for Railways in respect of two trains. In those trains, its personnel are deployed for sale of small articles of daily necessity and use to the passengers. Per force, the payments received by them are necessarily in cash. These amounts are



collected and in turn handed over to the assessee. The assessee in terms of its contract is bound to maintain constant supplies in the trains and ensure that at no point in time can the passengers be deprived of these articles (which are food articles, soft drinks and other items necessary for travel). In the course of such transactions, it sources these articles from M/s Shruti Enterprises. Apparently, that concern is also a small time one and insists on cash payments for ensuring continuity and timely supplies. Whilst, the Court is conscious and does not in any manner wish to comment adversely on the larger public interest element embedded in Section 40A and the underlying principle, at the same time, the Court also notes that the proviso seeks to relieve to a certain extent, the measure of hardship which might be imposed upon small businesses and professionals who are engaged in activities and are dependent entirely on timely cash flow. It is in such cases that Rule 6DD - which was formulated as a proviso to Section 40A (3) - steps in to aid such assessees and concerns. In this context, the statutory mandate in Section 6DD (k), at least in the circumstances of the case, has to be so construed as to mean that but for the cash payment, the assessee would have been deprived the benefit of supplies itself. This Court clarifies that the interpretation of the expression “who is required to make payment in cash” having regard to the circumstances of the case is fact dependent, at least in the present case. The consequence of instances of payment through account payee cheques in small business which are dependent on such supplies would be to completely stifle, if not stop, the business activities. It is in that sense that the expression “required” would have to be construed.

10. In view of the above discussion, this Court is of the opinion that



having regard to the peculiar facts and circumstances, the Tribunal and the lower authorities adopted an unduly narrow and technical interpretation of Rule 6DD(k), the benefit of which the assessee clearly was entitled to. The question of law is accordingly answered in favour of the assessee and against the Revenue.

11. The Appeal - ITA 636/2012 - is accordingly allowed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

DECEMBER 04, 2012
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