

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'F' BENCH
BEFORE SHRI U.B.S. BEDI, JM & SHRI A.N. PAHUJA, AM

ITA no.3/D/2011
Assessment year:2007-08

M/s Purvanchal Construction Works (P) Ltd., LSC, A-7, 2 nd Floor, Purvanchal Plaza, Mayur Vihar, Phase-II, New Delhi	V/s.	Additional CIT, Range-14, New Delhi
[PAN AAACP 4848 A]		

(Appellant)		(Respondent)
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Assessee by	S/Shri Anil Jain & Rishab Jain, ARs.
Revenue by	Shri B.R.R. Kumar, DR

Date of hearing	08-05-2012
Date of pronouncement	08-06-2012

ORDER

A.N.Pahuja:- This appeal filed on 03.01.2011 by the assessee against an order dated 15.11.2010 of the CIT(A)-XVII, New Delhi, raises the following grounds:-

1. *"The Id. CIT(A) has erred in confirming the order of the Assessing Officer by confirming the addition of ₹57,39,886/- being 20% of contract payments of ₹2,86,99,431/- u/s 40A(3). Out of the said addition the credit of ₹40 lakhs has been allowed by the AO out of the surrendered income and the net addition of ₹17,39,886/- has been made.*
2. *The Id. CIT(A) has erred in holding that the AO has considered the entire seized material while making the addition including Annexure A-1*

seized from 51-A, Johri Farm, Noor Nagar, Okhla, New Delhi specifically referred in the submissions.

3. *The order of the learned CIT(A) is against law and facts of the case.*
4. *The appellant craves the right to add, amend or withdraw any grounds of appeal at the time of hearing.*

2. Facts, in brief, as per relevant orders are that e-return declaring income of ₹30,67,87,220/-, filed on 29.10.2007 by the assessee, engaged in the business of construction and real estate, was selected for scrutiny with the service of a notice u/s 143(2) of the Income-tax Act, 1961 (hereinafter referred to as the Act), issued on 22.09.2008. In this case, during the course of a survey conducted u/s 133A of the Act on 27.2.2007 in the various premises of the assessee at NOIDA & Okhla, physical inventory of the stock was valued at ₹1,94,35,348/-. On the basis of material found during the course of survey, the assessee surrendered an amount of ₹3 crores detailed hereunder:-

		[In ₹]
A	Unaccounted stock	125 lakhs
B.	Miscellaneous income from Sale of scrap packaging Material, sundry stores, And earth etc.	` 100 lakhs
C	Income from parking & Other charges-	` 35 lakhs
D	Discrepancy in impounded Material.	` 40 lakhs
	Total	` 300 lakhs

2.1 On perusal of various documents impounded during the course of survey, the AO noticed that the registers D-8, D-27, D-28 and D-

50 found in premises at plot No.93/1, Sector-93, Noida contained details of cash paid to labourers, workers, masons, electricians etc. and these transactions in cash exceeded ₹20,000/- each. To a query by the AO, the assessee replied that figures and name of the parties entered in D-27 and D-28 are duplicate of entries noted in annexure D-8 and D-50. The AO further noticed that these were daily cash disbursement registers and reflected cash payment entries exceeding ₹20,000/- each in violation of the provisions of section 40A(3) of the Act. To a further query, the assessee replied that all the entries contained in the aforesaid annexures were recorded in the books of account and the figures of more than ₹.20,000/- each appearing against the name of various parties in the annexure mainly represented the total amount to be paid for labour charges at a particular time. As and when the funds were received at site, the site staff listed the name of labour in charge with amount due to them against their name. Thereafter, funds were released over the next few days. The assessee did not make any lump sum payments to its labour contractors in one go and only small amounts i.e. less than ₹20000/ each were paid to them over a period of time. Moreover, TDS on these payments was deducted and paid into the government account in time, the assessee pointed out. The assessee also enclosed copies of ledger a/c and affidavits from some of the parties as a sample to the effect that no cash payments exceeding ₹.20000/- each at one time have ever been made to them during the year. However, the AO did not accept the submissions of the assessee and concluded as under:-

“The submission of the assessee is considered. It is noticed that to bypass the provisions of section 40A(3), the assessee has divided the above payments below ₹.20,000/- claiming it to be made on different dates. Few examples of such bifurcation are given as under:

- i) *Page 22 of Annexure D-8 (or page 148 of Annexure D-27) indicates that payment of ₹.1,57,000/- has been made to Jumerati on 10.06.06. The above payment while recording in regular books of accounts has been recorded as under:*

<i>Date</i>	<i>Amount (₹.)</i>
10.06.2006	19,000/-
12.06.2006	19,000/-
13.06.2006	19,000/-
14.06.2006	19,000/-
15.06.2006	19,000/-
16.06.2006	19,000/-
17.06.2006	19,000/-
19.06.2006	19,000/-
20.06.2006	5,000/-
<i>Total</i>	<i>1,57,000/-</i>

Thus, to avoid the applicability of section 40A(3), the above payment has been entered on different dates.

- ii) *Page 15 of Annexure D-8 (or page 115 of Annexure D-27) indicates that payment of Rs.1,16,000/- has been made to P.K.Suraj on 12.05.06. The above payment while recording in regular books of accounts has been recorded as under:*

<i>Date</i>	<i>Amount (₹.)</i>
13.05.2006	19,000/-
15.05.2006	19,000/-
16.05.2006	19,000/-
17.05.2006	19,000/-
18.05.2006	19,000/-
19.09.2006	19,000/-
20.05.2006	2,000/-
<i>Total</i>	<i>1,16,000/-</i>

Thus, to avoid the applicability of section 40A(3), the above payment has been entered on different dates.

- iii) *Page 01 of Annexure D-50 (or page 59 of Annexure D-28) indicates that payment of ₹.1,16,400/- has been made to Ramjan Ali on 11.12.06. The above payment while recording in regular books of accounts has been recorded as under:*

<i>Date</i>	<i>Amount (₹.)</i>
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11.12.2006	19,000/-
12.12.2006	19,000/-
13.12.2006	19,000/-
14.12.2006	19,000/-
15.12.2006	19,000/-
16.12.2006	19,000/-
18.12.2006	2,400/-
<i>Total</i>	<i>1,16,400/-</i>

Thus, to avoid the applicability of section 9-0A(3), the above payment has been entered on different dates.

iv) Page 10 of Annexure D-50 (or page 110 of Annexure D-28) indicates that payment of ₹.1,21,700/- has been made to Ainul on 16.01.2007. The above payment while recording in regular books of accounts has been recorded as under:

<i>Date</i>	<i>Amount (₹.)</i>
16.01.2007	19,000/-
17.01.2007	19,000/-
18.01.2007	19,000/-
19.01.2007	19,000/-
20.01.2007	19,000/-
22.01.2007	19,000/1-
23.01.2007	7,700/-
<i>Total</i>	<i>1,21,700/-</i>

Thus, to avoid the applicability of section 40A(3), the above payment has been entered on different dates.

From the above examples, it can very well be seen that the payments made in single transaction to a particular person has been divided into multiple entries while recording the same in regular books of accounts. As the registers were found during the course of survey, these are primary evidence and are more reliable. The submissions made subsequently are only afterthoughts to give them the genuine colour. When the department is in possession of primary evidence, heavy reliance is to be placed on them. The subsequent submission cannot reduce and weaken the evidentiary value of primary documents. As discussed above, the above registers clearly give the details of

payments made in cash exceeding ₹.20000/-, thus, there is the clear-cut violation of the provisions of section 40A(3). Section 40A(3), relevant to assessment year under consideration reads as under:

“(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969 as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft, twenty per cent of such expenditure shall not be allowed as a deduction. ”

From the facts of the case, it can be seen that the assessee has made the payment exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft. Therefore, 20% of such expenditure is required to be disallowed. The total amount paid in cash exceeding ₹.20,000/- is worked out at ₹.2,86,99,431/-. The above working was also verified by the assessee during assessment proceedings. Thus, the assessee has made payment of ₹.2,86,99,431/- in cash in violation of the provision of section 40A(3). Therefore, 20000/- of the above amount comes to ₹.57,39,880!-. The assessee demanded that as he surrendered Rs.40 lacs during survey, on account of discrepancies in impounded material, the benefit of the same should be given to him. As the above surrender was to cover-up the discrepancies in the impounded material, the benefit of the same is granted to the assessee.. Considering above ₹.17,39,886/- (57,39,886 - 40,00,000) is disallowed and added to the total income of the assessee.”

3. On appeal, the learned CIT(A) upheld the disallowance made by the AO in the following terms:-

“3. I have carefully considered the submissions of Id AR and perused the assessment order passed by the AO. I find that the submissions made by the Ld. AR are not acceptable. It is seen from the assessment order that the AO has considered all the documents seized during the course of survey and also the explanation of the assessee company

on various entries submitted during the course of assessment. Therefore, the submissions of the Ld. AR are rejected. From the perusal of the documents impounded during the survey, it is seen that appellant has made cash payment of ₹.2,86,79,431/- in cash exceeding ₹.20,000. The said working was also verified by the appellant during the assessment proceedings before the AO. The Ld: AR has not been able to point out that the entries contained in old ledger at page 21 are not correct. He submitted that the same related to the gross payment. However, it is seen from Annexure D-8 page 22 that the appellant company has made cash payments to Mr. Jamurati amounting to Rs.1,57,000/- and same has been debited from the cash balance. This payment was made on 08.06.2006. Similarly, cash payment of ₹. 1,16,000/- was made to Mr. P. K. Suraj on 12.05.2006, ₹.1,16,400/- to Mr. Ramzan Ali on 11.12.2006 and ₹.1,21,700/- to Ainul on 16.01.2007. All these payments were made in single transaction as cash of that amount has been debited from the cash balance. The submission of Ld. AR are that these figures are aggregate of the cash payments is not supported by the evidence available on the record. Thus, it is clear from the above discussion that payment in cash were made in violation of section 40A(3) of the I.T. Act, 1961. Therefore, the disallowance u/s 40A(3) comes to Rs.57,39,886/-. Since, the appellant company had surrendered Rs.40 lakh during survey on account of discrepancies in impounded material, the AO allowed benefit of the same and added balance amount of Rs.17,39,886/- only. Considering the facts and circumstances of the case in its totality, I hold that the AO was justified in making the addition. Therefore, the addition made by the AO is confirmed. These grounds of appeal are rejected."

4. The assessee is now in appeal before us against the aforesaid findings of the Id. CIT(A).The Id.AR on behalf of the assessee while carrying us through the impugned orders & the relevant documents placed on page 1 to 15 of the paper book contended that the AO failed to consider these documents found during the survey While inviting our attention to affidavits of Shri Jamurati, Shri P.K. Suraj and Ramjan Ali at pages 7 to 12 of the paper book, the Id.AR pointed out that the Id. CIT(A) did not refute the statements made by the deponents in their respective

affidavits. It was further submitted that documents placed at page 25 and 37 of the paper book revealed details about payments due and not actual payments while the payments actually paid by the assessee were reflected in their books of account.

5. On the other hand, the Id. DR while relying to pages 18 and 26 of the paper book relied upon the findings of the Id. CIT(A).

6. We have heard both the parties and gone through the facts of the case. At the outset, we may have a look at the relevant extant provisions of sec. 40A(3) of the Act, which read as under:

(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft, twenty per cent. of such expenditure shall not be allowed as a deduction:

Provided that where an allowance has been made in the assessment for any year not being an assessment year commencing prior to the 1st day of April, 1969, in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year the assessee makes any payment in respect thereof in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the allowance originally made shall be deemed to have been wrongly made and the Assessing Officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned

from the end of the assessment year next following the previous year in which the payment was so made:

Provided further that no disallowance under this sub-section shall be made where any payment in a sum exceeding twenty thousand rupees is made otherwise than by an account payee cheque drawn on a bank or account payee bank draft , 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.

6.1 There is no dispute that the case of the assessee does not fall within any of the exception provided in rule 6DD of the IT Rules, 1962 nor the Id. AR on behalf of the assessee made any such claim before us. Only plea of the Id. AR is that affidavits furnished by the assessee of six persons placed at page 7 to 12 of the paper book and certain documents were not considered by the Id. CIT(A). Indisputably, in this case a survey was conducted in the premises of the assessee on 27.2.2007, when certain impounded documents revealed cash payments exceeding ₹20,000/- each. On the basis of material found during the survey assessee surrendered undisclosed income of ₹3 crores. The impounded documents revealed cash payments exceeding ₹20,000/- each to the extent of ₹2,86,79,431/- . The AO also referred to certain documents at Page 22 of Annexure D-8 (or page 148 of Annexure D-27) ; Page 15 of Annexure D-8 (or page 115 of Annexure D-27) ; Page 01 of Annexure D-50 (or page 59 of Annexure D-28) in his order while making the disallowance. The Id. AR claimed before us the payments were actually below ₹20,000/- each while documents impounded reflected payments due and not actually made. However, no evidence has been placed before us in support of this assertion. The affidavits of six persons all dated 22.12.2009 filed at the fag end of assessment proceedings and after

more than three years of the relevant transactions are not corroborated by any material whatsoever. These affidavits dated 22.12.2009 were obviously filed at the instance of the assessee to serve his interest and such self-serving affidavits hardly achieve any purpose, especially when no cogent material has been placed before the lower authorities and even before us in support of contents of the affidavits. The Id. CIT(A) on perusal of the documents impounded during the survey, found that the Id. AR has not been able to point out that the entries contained in old ledger at page 21 are not correct. Annexure D-8 page 22 revealed that the assessee company made cash payments to Mr. Jamurati amounting to `s.1,57,000/- and same has been debited from the cash balance on 08.06.2006. Similarly, cash payment of `1,16,000/- was made to Mr. P. K. Suraj on 12.05.2006, `1,16,400/- to Mr. Ramzan Ali on 11.12.2006 and `1,21,700/- to Ainul on 16.01.2007. All these payments were made in single transaction as cash of that amount has been debited from the cash balance. The Id. CIT(A) also rejected the plea on behalf of the assessee that these figures were aggregate of the cash payments, being not supported by the evidence available on the record. In these circumstances, the Id. CIT(A) upheld the disallowance. There is nothing to suggest that the relevant material has not been considered by the lower authorities. Not even a whisper has been made before us as to why the aforesaid payments could not be made by crossed cheques/demand draft or that these were made out of sheer necessity. The transactions are of wholesale nature. We do not understand that how payments by crossed cheques/demand drafts can in such circumstances be held to be impracticable. Since the Id. AR has not placed before us any material, controverting the aforesaid findings of facts recorded by the Id. CIT(A) so as to enable us to take a different view in the matter, we are not inclined to interfere. Therefore, ground nos.1 & 2 in the appeal are dismissed.

7.. Ground No.3 in the appeal being general in nature, does not require any separate adjudication while no additional ground having been raised before us in terms of residuary ground no.4 in the appeal, accordingly, these two grounds are dismissed.

8. No other plea or argument was raised before us.

9. In the result, appeal is dismissed.

Order pronounced in open Court

Sd/-
(U.B.S. BEDI)
(Judicial Member)

Sd/-
(A.N. PAHUJA)
(Accountant Member)

NS

Copy of the Order forwarded to:-

1. Assessee
2. Additional CIT, Range-14, New Delhi
3. CIT concerned
4. CIT (Appeals)-XVII, New Delhi
5. DR, ITAT, 'F' Bench, New Delhi
6. Guard File.

By Order,

Deputy/Asstt.Registrar
ITAT, Delhi