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

Date of decision: 6th February, 2012

+ ITA 48/2011
+ ITA 49/2011
+ ITA 56/2011

BASU DISTRIBUTOR PVT LTD Appellant

Through: Mr. Kaanan Kapur, Adv.

versus

ASST COMMISSIONER OF INCOME TAX Respondent

Through: Mr. Abhishek Maratha, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V.EASWAR

JUDGMENT

SANJIV KHANNA, J: (ORAL)

1. Basu Distributors Pvt. Ltd. has filed the above noted three appeals against the common impugned order of the Income Tax Appellate Tribunal ('Tribunal', for short) dated 07.08.2009 disposing of ITA No.4262/Del/2007, ITA No.4263/Del/2007 and ITA No.4264/Del/2007 pertaining to assessment years 1992-93, 1993-94 and 1994-95 respectively.

2. After hearing counsel for both the parties, we hereby frame the

substantial question of law, being common to the three appeals, as under: -

“(i) Whether Income Tax Appellate Tribunal was right in holding that the payments above Rs.10,000/- each made in cash by the appellant assessee violated Section 40A (3) of the Income Tax Act, 1961 read with Rule 6 DD (j) of the Income Tax Rules, 1962.”

4. The appellant-assessee is engaged in the business of film distribution. During the three relevant assessment years, the appellant-assessee made payments in cash, the details of which are given as under: -

DESCRIPTION OF CASH TRANSACTION FOR ASSESSMENT YEARS 1992-93, 1993-94 & 1994-95 INVOLVED IN THE APPEALS”

ASSESSMENT YEAR 1992-93: -

- 1. Rs.50,000/- on 13.09.1991 to M/s. Honey Enterprises*
- 2. Rs.25,000/- on 20.11.1991 to M/s. Honey Enterprises*
- 3. Rs.22,500/- on 01.01.1992 to M/s. Honey Enterprises*

Total : Rs.97,500/-

ASSESSMENT YEAR 1993-94: -

- 1. Rs.50,000/- on 04.05.1992 to M/s. Honey Enterprises*
- 2. Rs.35,000/- on 08.05.1992 to M/s. Honey Enterprises*
- 3. Rs.15,000/- on 11.05.1992 to M/s. Honey Enterprises*
- 4. Rs.20,000/- on 13.07.1992 to M/s. Bedi Associates*
- 5. Rs.13,000/- on 13.06.1992 to M/s. Film Jagat*
- 6. Rs.25,000/- on 02.09.1992 to M/s. Chipu Pictures*

Total : Rs.1,58,000/-

ASSESSMENT YEAR 1994-95: -

1. Rs.41,000/- on 08.04.1993 to M/s. Bobby Art International
2. Rs.12,500/- on 15.05.1993 to M/s. Film Jagat
3. Rs.15,000/- on 22.05.1993 to M/s. Film Jagat
4. Rs.30,000/- on 01.06.1993 to M/s. Film Jagat
5. Rs.12,500/- on 22.05.1993 to M/s. MKD Film Enterprises
6. Rs.11,831/- on 03.03.1994 to M/s. Ekta Films
7. Rs.38,000/- on 23.06.1993 to M/s. Honey Enterprises

Total : Rs.1,60,831/-

5. The issue raised is whether the aforesaid cash payments made by the appellant-assessee violated provisions of Section 40A (3) of the Income Tax Act, 1961 ('Act', for short) read with Rule 6 DD (j) of the Income Tax Rules, 1962.

6. It is an admitted position that the Circular No.220 dated 31.05.1997 was applicable to clause (j) of the said Rule, which reads as under: -

“Clause (j) of rule 6 DD of the Income-tax Rules, 1962, provides that no disallowance under section 40A(3) of the Income-tax Act, 1961, shall be made where the assessee satisfies the Income-tax Officer that the payment could not be made by way of a crossed cheque drawn on a bank or by a crossed bank draft –

(a) due to exceptional or unavoidable circumstances; or

(b) because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof;

and also furnishes evidence to the satisfaction of the

Income-tax Officer as to the genuineness of the payment and the identity of the payee.

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4. *All the circumstances in which the conditions laid down in rule 6DD(j) would be applicable cannot be spelt out. However, some of them which would seem to meet the requirements of the said rule are: -*

- (i) The purchaser is new to the seller; or*
- (ii) The transactions are made at a place where either the purchaser or the seller does not have a bank account; or*
- (iii) The transactions and payments are made on a bank holiday; or*
- (iv) The seller is refusing to accept the payment by way of crossed cheque/ draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller; or*
- (v) The seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchased the goods; or*
- (vi) Specific discount is given by the seller for payment to be made by way of cash.*

5. *It can be said that it would generally satisfy the requirements of rule 6DD (j), if a letter to the above effect is produced in respect of each transaction falling within the categories listed above from the seller giving full particulars of his address, sales tax number/ permanent account number, if any, for the purposes of proper identification to enable the*

Income-tax Officer to satisfy himself about the genuineness of the transaction. The Income-tax Officer will, however, record his satisfaction before allowing the benefit of rule 6DD(j).

6. *It is further clarified that the above circumstances are not exhaustive but illustrative. There could be cases other than those falling within the above categories which would also meet the requirements of rule 6DD(j)."*

7. The Tribunal has rejected the explanation given by the appellant- assessee, inter alia holding that the said payments should have been made through account payee drafts and by depositing cash in the bank account in order to issue the drafts. The reasoning given by the Tribunal in the impugned order reads as under: -

"12. The general rule is that the explanation offered by the assessee should not be vague, fantastic or fanciful. It must be an explanation acceptable to the fact finding authority. It must be supported with cogent reliable and relevant evidence only then the explanation offered by the assessee could be called genuine and bonafide. In the instant case in order to get out of the clutches of the provisions of Sub-Sec. 3 of S.40 A, the assessee first time made the payments by crossed cheques. However, there is no explanation as to why sufficient amount was not available in the bank account of the assessee which led to the bouncing of the cheques. Even if the cheques bounced as to what prevented the assessee from issuing crossed bank drafts in favour of the principal by depositing cash in the bank for making the bank drafts in case the assessee actually and genuinely wanted to create confidence in the principals for maintain good business relation in future. Further, the assessee has not explained as to where from it obtained the cash for making the payments in

cash and whether it was its own cash or it was an amount borrowed from someone. In case the assessee had obtained the amount as loan in cash for making payment to the principals, then the assessee has again violated provisions of S.269 SS by obtaining loan in cash and not by account payee cheques or account payee bank draft.

12. From the facts explained hereinabove, it is evident that in fact the assessee never genuinely intended to make the payments initially by crossed cheques/ drafts in compliance with the provisions of Sub-Sec. 3 of S.40A read with Rule 6 DD and simply adopted this route to get protection under clause (j) of Rule 6DD of I.T. Rules by ultimately succeeding in making the payments in cash to the principals, which appears to be the real intention of the assessee right from the beginning. From the facts narrated above, we conclude that the explanation offered by the assessee is fantastic and fanciful but does not appeal to reason in view of the circumstances, as detailed hereinabove, and, hence, the same cannot be accepted being not bonafide and genuine and is accordingly rejected. For the reasons stated above the consolidated order of CIT(A), confirming the order of AO in making the impugned addition under provisions of S. 40A(3) of I.T. Act, is upheld. The ground nos.1 to 3 of the instant appeals of the assessee are rejected.”

8. There is no dispute in the present case regarding the identity of the payee and genuineness of the transaction/ payment and the respondent-Revenue has not denied and/ or contested the same. The respondent-Revenue, accepts the identity of the payee and genuineness of the transaction/ payments. The contentions raised before us, pertain to whether or not the appellant-assessee has been able to establish exceptional or

unavoidable circumstances why the payment made in cash or was justified as it was not practicable to make such payment by a crossed cheque or bank draft.

9. In the present case, the appellant assessee had filed before the Tribunal a copy of their bank account statements as well as ledger account of the parties to whom the payment was required to be made. It is apparent that the appellant-assessee was not doing well in its business and was facing liquidity and financial crunch. An examination of the bank account statement shows that whenever cash deposit was made in the bank account, it was immediately thereafter utilized to issue cheques towards the expenditure. The explanation of the appellant-assessee was that payments were made in cash, as preparation of a bank instrument or issue of cheque would have resulted in a missed opportunity or failure of a favourable or good business deal with the third parties. The provisions of Section 40A (3) and Rule 6 DD (j) have been incorporated in the Act in order to check the incurring of bogus and fictitious expenses to non existing parties. In the present case, the appellant-assessee had furnished explanations on the basis of the bank statements as well as the ledger accounts of the payees to show that the appellant-assessee did not have sufficient cash balance. This

position is clear and cannot be doubted. The appellant-assessee had submitted that if they had failed to make cash payments, they would have breached terms of the agreements entered into with the third parties or would have missed out on the business opportunity. In cases of earlier bounced cheques and when a party is facing liquidity problem, it can get difficult as third parties are reluctant to accept cheques and insist on cash payments. Arranging funds is also a problem and not easy. It is submitted that the Assessing Officer did not doubt the funds and no addition on this ground and reason was made. The stand of the appellant was that the cash was made available since M/s. Ritz Theatres (P) Ltd. was holding the cash collection out of the hire charges. On the said aspect an order of remit was passed by the tribunal and no addition or adverse observation was made by the Assessing Officer. These were relevant and material aspects which were required to be considered and examined by the tribunal but have been overlooked. Keeping in view the quantum of the total amount, we were initially inclined to remit the matter. However, looking at the averments made, the assessment years in question and explanation given, we refrain from issuing the said direction and accept the contention of the appellant.

11. In view of the aforementioned, the answer to the above question is in

negative and in favour of the appellant and against the Revenue. The appeal is allowed. No costs.

SANJIV KHANNA, J

R.V.EASWAR, J

FEBRUARY 06, 2012

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