IN THE INCOME TAX APPELLATE TRIBUNAL,
JODHPUR BENCH, JODHPUR

BEFORE : SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER

ITA No.391/Jodh/2011
Assessment Year: 2008-09

M/s Vaishali Builders & Colonizers, D-164, Shastri Nagar, Jodhpur. (PAN: AAFFV 5706 K). (Appellant)	vs.	Addl. Commissioner of Income Tax, Range-1, Jodhpur. Udaipur. (Respondent)

Appellant by	:	Shri Amit Kothari, A.R.
Respondent by	:	Shri Subhash Chandra, C.I.T.-DR

Date of Hearing	:	04.07.2012
Date of Pronouncement of order	:	25.07.2012

ORDER

Per Bhavnesh Saini, J.M.:

This appeal by the assessee is directed against the order of the ld. CIT(A), Jodhpur dated 13.10.2011 for the assessment year 2008-09 on the following grounds :

> *"1. The impugned order passed by the Ld. CIT(A) and the impugned assessment order is contrary to the provisions of law, contrary to facts, material and evidence existing on records, contrary to all cannons of natural justice.*
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> *2. The Ld. CIT(A) has erred in not accepting the assessee's contention that the impugned assessment order passed by the Ld.*

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Assessing Authority is patently without jurisdiction and is void ab initio.

3. The Ld. CIT(A) has erred in confirming the disallowance of Rs.1,12,00,000/- made by the Ld. AO by wrongly invoking the provisions of section 40A(3).

4. That on the facts and circumstances of the present case, the provisions of section 40A(3) are not applicable in respect of the agricultural land purchased by the assessee. The Ld. CIT(A) ought to have deleted the aforesaid addition of Rs.112,00,000/- made in the declared income,

5. The Ld. CIT(A) ought to have accepted the assessee's contention that the payment so made by the assessee for purchase of agricultural land is covered by the exceptional circumstances mentioned in Rule 6DD. The entire disallowance made by the Ld. AO amounting to Rs.1,12,00,000/- ought to have been deleted by the Ld. CIT(A).

6. The Ld. CIT(A) have ought to have cancelled the interest charged u/s 234A, 234B and 234C.

2. We have heard the ld. Representatives of both the parties, perused the findings of the authorities below and considered the material available on record.

3. On ground No.1 & 2, noted above, the assessee challenged the jurisdiction of the Assessing Officer (Addl. CIT, Range-I, Jodhpur) in passing the assessment order in question. The assessee submitted before the ld. CIT(A) that the return was filed with the ACIT, Circle-1 and notice u/s. 143(2)/142(1) were issued by the ACIT. However, subsequently, the case was transferred and commenced by the

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ACIT, Circle-1, Jodhpur and the order is also passed by the Additional CIT u/s. 143(3) on December, 2010. It was further stated that the ACIT, Range-1, Jodhpur had already started the assessment proceedings and the notice u/s. 143(1) was issued by him and the final order being made by some other officer not having jurisdiction over the matter. The ld. CIT(A) called for the report from the Assessing Officer, in which he has stated that the assessee has challenged the assessment order passed by the Additional CIT, Range-1, Jodhpur at the appellate stage. As per section 120, the additional CIT is also an Assessing Officer. From the assessment record, it is clear that the Addl. CIT, Range-I, Jodhpur has issued the notice u/s. 142(1) on 09.09.2010 and after that the assessee filed the details before him and participated in the assessment proceedings in compliance to his query letters dated 05.10.2010, 14.10.2010, 09.11.2010, 23.11.2010, 30.11.2010 and 02.12.2010. Therefore, it was not justifiable to challenge the notice issued by the Addl. CIT and his jurisdiction at the appellate stage. The AO relied upon section 124(3) of the IT Act, which provides that no person shall be entitled to call in question the jurisdiction of an Assessing Officer where he has filed return of income u/s. 139(1), after expiry of one month from the date on which he was served with the notice u/s. 142(1) or 143(2) or after the completion of assessment, whichever is earlier. The ld. CIT(A) considering the explanation of the assessee in the light of the report submitted by the AO and order sheets, dismissed the

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objection of the assessee regarding jurisdiction of the AO (Addl. CIT, Range-1, Jodhpur). The findings of the ld. CIT(A) in the appellate order in para 3.3 are reproduced as under :

"3.3. I have considered the submission of the appellant and report of the Assessing Officer and I find that no such issue was raised by the appellant before the Assessing Officer while finalizing the assessment order. The appellant complied with reference to notices/letters issued by the Addl. CIT, Range – 1, Jodhpur. The appellant has furnished all the details before the Addl. CIT as required by him on various occasion. On all these occasions, the assessee has neither raised this point before the Addl. CIT, Range – 1, Jodhpur. The Addl. CIT, Range – 1, Jodhpur is having concurrent jurisdiction over the cases pertain to Range – 1, of Jodhpur. The Addl. CIT in exercise of power conferred in sec. 120 has rightly issued the notices. Further, as per sec. 124(3) no person shall be entitled to call in question the jurisdiction of an Assessing Officer. So, the point raised during the appellate proceeding cannot be accepted. The appellant cannot be validly raised as any challenge to order of transfer shall be raised by the assessee in independent proceeding; if no such challenge was made at the initial stage, the issue cannot be raised in an appeal against assessment order, as has been clarified by Hon'ble Punjab & Haryana in the case of Jaswindeer Kaur Kooner (291 ITR 80 P&H). In view of this, the ground of appeal is dismissed."

4. The ld. counsel for the assessee reiterated the submissions made before the ld. CIT(A) and submitted that first notice u/s. 143(2) was issued by the ACIT, Circle-1, Jodhpur. Therefore, Addl. CIT, Range-1 Jodhpur cannot pass the assessment order without further issue of notice u/s. 143(2). He has, however, admitted that the assessee participated in the proceedings before the Addl. CIT in response to the statutory notices and no objection regarding jurisdiction was raised

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before the AO. He has referred to section 120(5) of the IT Act and submitted that since ACIT and Addl. CIT Range-1, Jodhpur were having concurrent jurisdiction, therefore, ACIT should have passed the assessment order. He has submitted that there was no jurisdiction order in favour of the Addl. CIT. On the other hand, the ld. DR relied upon the order of the AO and submitted that there is no need that further notice u/s. 143(2) should be issued by the Addl. CIT. As per scheme of the Act, Addl. CIT is also Assessing Officer. The assessee appeared before the Addl. CIT as Assessing Officer and participated in the assessment proceedings before him and no objection regarding jurisdiction was raised before him. Therefore, the objection of the assessee has been rightly turned down by the ld. CIT(A). The ld. DR filed copy of jurisdiction order u/s. 127(1) dated 25.08.2010 in favour of Addl. CIT, Range-1, Jodhpur in the case of the assesse for the assessment year under appeal as issued by the CIT-I, Jodhpur. He has, therefore, submitted that Addl. CIT was having jurisdiction over the case of the assessee.

5. We have considered the rival submissions and the material on record and do not find any justification to interfere with the order of the ld. CIT(A). Section 124 of the IT Act provides as under :

"Jurisdiction of Assessing Officers.

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124. (1) Where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction—

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.

(2) Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Director General or the Chief Commissioner or the Commissioner; or where the question is one relating to areas within the jurisdiction of different Directors General or Chief Commissioners or Commissioners, by the Directors General or Chief Commissioners or Commissioners concerned or, if they are not in agreement, by the Board or by such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, specify.

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—

(a) where he has made a return 21[under sub-section (1) of section 115WD or] under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or 21[sub-section (2) of section 115WE or] sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier;

(b) where he has made no such return, after the expiry of the time allowed by the notice under 22[sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of

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the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144] to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.

(4) Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.

(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120."

5.1 On reading the provisions of section 124 (2) of the IT Act above, the issue of jurisdiction to assess the person shall be determined by the Director General, Chief Commissioner or the Commissioner or in other cases, by the Board and sub-sec.(4) of section 124 provides that where the assessee questioned the jurisdiction of the AO as per section 124(3), then the AO shall, if not satisfied with the correctness of the claim of the assessee, refer the matter for determination under sub-section (2) before the assessment is made, i.e., the question to be referred to the Director General, CCIT, CIT or the Board, as the case may be. Hon'ble Allahabad High Court in the case of Hindustan Transport Co. vs. IAC of Income-tax reported in (1991) 189 ITR 326, considering the objections to the jurisdiction of the Assessing

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Officer held that objection cannot be raised after the assessment is completed. In this case, the assessment order under consideration of the assessment year 1985-86 and Hon'ble Allahabad High Court considering the provisions of section 124 of the IT Act considered the following points :

(i). What is the nature of the power of transfer conferred by the Act ? and

(ii). How the Act itself views a defect of the nature involved in the present case ?

We may mention that the provisions of section 124 as were applicable in assessment year 1985-86 are almost similar to the provisions contained in section 124 of the IT Act after amendment, which are applicable to the present case. Hon'ble Allahabad High Court further held –(page 331)

> "*Being an enactment aimed at collecting revenue, the Legislature did not intend collection of revenue to be bogged down on account of technical plea of jurisdiction. It has, therefore, prescribed the limit up to which the plea of jurisdiction may be raised. As provided in section 124(5)(a), the right is lost as soon as the assessment has been completed. Even where the right is exercised before the assessment is completed, the question is to be decided by the Commissioner or by the Board. Courts do not come into the picture.*
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> *From the above provisions of the Act, it is apparent that the Act does not treat the allocation of functions to various authorities or officers as one of substance. It treats the matter as one of procedure and a defect of procedure does not invalidate the end action. The answer to the first question, therefore, is that the power is administrative and procedural and is to be exercised in the interest of exigencies of tax collection and the answer to the second question is*

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that, under the Act, a defect arising from allocation of functions is a mere irregularity which does not affect the resultant action."

5.2 The ITAT, Delhi Bench in the case of Triveni Engineering and Industries Ltd. vs. DCIT, 280 ITR (AT) 210 (Delhi), following the above decision of Hon'ble Allahabad High Court, decided the issue against the assessee.

5.3 It is admitted fact that the assessee did not raise any objection before the AO (Addl. CIT) within one month from the date of service of notice u/s. 142(1) till the completion of the assessment. The assessee participated in the assessment proceedings before the AO. The assessee, therefore, cannot raise issue of jurisdiction before the ld. CIT (A) at the appellate stage. Since no objection regarding jurisdiction was raised as required u/s. 124(3) within the period of specified under law, as above, therefore, the objection of the assessee is not tenable. The Addl. CIT is also the Assessing Officer as per scheme of the Act having concurrent jurisdiction over the case of the assessee. Further, section 127 of the IT Act provides the powers to transfer the cases and reads as under :

"Power to transfer cases.

127. *(1) The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case*

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from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.

(2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same Director General or Chief Commissioner or Commissioner,—

(a) where the Directors General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director General or Chief Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(b) where the Directors General or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf.

(3) Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the offices of all such officers are situated in the same city, locality or place.

(4) The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred.

Explanation.—In section 120 and this section, the word "case", in relation to any person whose name is specified in any order or

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direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year.

5.4 The ld. DR produced the copy of the order u/s. 127 of the IT Act dated 25.08.2010 passed by CIT-I, Jodhpur transferring the jurisdiction of the case of the assessee with Addl. CIT, Range-1, Jodhpur. Thus, the concurrent jurisdiction with Addl. CIT, Range-1, Jodhpur was conferred with the "jurisdiction" to pass the assessment order in the case of the assessee. According to sub-sec. (3) of section 127, there was no need to give any opportunity to the assessee for transfer of case of the assessee from earlier AO, ACIT to Addl. CIT, Range-1, Jodhpur because both were situated in the same city, locality or place. Further, sub-sec. (4) of section 127 provides that the transfer of the case can be made any stage of proceedings and shall not render necessary the re-issue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred. Therefore, there is no need to issue notice u/s. 143(2) of the IT Act again and there is no further requirement under the law to issue another notice u/s. 143(2) of the Act because once such a notice is issued within the period of limitation, there is no requirement by law to issue such notice u/s. 143(2) again and again at different stages. The Explanation to section 127 also clarifies regarding concurrent

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jurisdiction of the officer of the same range which would clearly negate the objection of the ld. counsel for the assessee. Therefore, the Addl. CIT, Range-1, Jodhpur was having proper jurisdiction over the case of the assessee to pass the assessment order in the matter. There is compliance of section 127 of the IT Act in the matter and the assessee has not raised any objection of jurisdiction within the period of limitation as provided u/s. 124(3) of the Act. Therefore, the objection of the assessee has been rightly rejected by the ld. CIT(A). Considering the above discussion, we do not find any merit in ground No. 1 & 2 of appeal of the assessee. The same are, accordingly, dismissed.

6. On ground No. 3 to 5, the assessee challenged the disallowance of Rs.1,12,00,000/- u/s. 40A(3) of the IT Act. According to the AO, during the assessment proceeding, the assessee submitted that there have been purchases of Rs.5,37,57,500/- and the assessee has made sales amounting to Rs.5,84,30,300/-. Vide note sheet entry dated 5-10-2010, the assessee was asked to furnish mode of payment to parties to whom payments for purchase have been made. The assessee furnished the details of purchases vide letter dated 23-11-2010 wherein the mode of payment was mentioned. In these details the following two details were noticed:-

F.Y.	*Party Name*	*Address*	*Paymen*	*Gross*

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			t	Amount
2007-08	Shivya Bijiya & Dhaliya	Vill & Post Choka, Jodhpur	Cash	1,80,60,000/-
2007-08	Shivya Bijiya & Dhaliya	Vill & Post Choka, Jodhpur	Cheque	10,00,000/-

During the discussion, the assessee was asked as to why payment for purchase of land has been made in cash. The first reply of the assessee was that the persons receiving the money insisted for payment through cash only. However, it was indicated to him that next payment to the same person has been made in cheque. So the reply of the assessee is contradictory. The Assessing Officer further stated on the same day vide order sheet entry dated 23-11-2010, the assessee was asked to explain why the expenditure made in cash for purchase of land should not be disallowed u/s 40A(3). The assessee furnished the details of mode of payment as under :-

F.Y.	Party Name	Address	Payment	Gross Amount
2007-08	Shivya Bijiya & Dhaliya	Vill & Post Choka, Jodhpur	Cah	1,80,60,000/-
2007-08	Bijaran/Kirtaram	Vill & Post Choka, Jodhpur	Cash	10,00,000/-
		Total		1,90,60,000/-

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6.1 The assessee replied vide letter date 30-11-2010 before the Assessing Officer as under :-

The assessee has relied the provision of Section.40A(3).

The condition when an assessee can claim exemption is given in Rules 6DD of the Income Tax Rules. However, the assessee has not cited any provision of this Rule and the only explanation of the assessee that the payment has been made within the limit of R.20,000/- specified by the Act. The idea behind the introduction of such provision was to curb the transaction in cash. However, a limit was specified so that small traders/businessmen do not fell the pinch of the provision and their small day to day activities are not affected. The explanation of the assessee may be applied to a case where each bill is less than Rs.20,000/- and the payment for such bills is being made in cash. Here the assessee has credited whole amount as given below :-

F.Y.	*Party Name*	*Address*	*Payment*	*Gross Amount*
2007-08	*Shivya Bijiya & Dhaliya*	*Vill & Post Choka, Jodhpur*	*Cash*	*1,80,60,000/-*
2007-08	*Bijaran/Kirtaram*	*Vill & Post Choka, Jodhpur*	*Cash*	*10,00,000/-*

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		Total		*1,90,60,000/-*

In the account of the above mentioned person and then has shown cash payment of less than Rs.20,000/- in a day. At the year end a credit balance of Rs.78,60,000/- has been carried forward to the next year. Thus, it is not a case of each bill being less than Rs.20,000/-. The whole payment for purchase of one chunk of land is not less than Rs.20,000/-. It is only the payment which has been staggered over a period of time. In view of this, the Assessing Officer concluded that the assessee has violated the provision of Sec.40A(3). However the total amount of payment in this manner during Financial Year 2007-08 relevant to A.Y. 2008-09 is only Rs.1.12 crore (i.e. Rs.1,90,60,000/- - Rs.78,60,000/-). So in view of the provision of Sec. 40A(3), an amount of Rs.1,12,00,000/- was disallowed and added to the total income.

7. The assessee before Ld. CIT(A) has submitted in its submission dated 7-12-2010 that the payment made for purchase of land and the assessee had not made any violation of the provision of Section.40A(3) of the I.T. Act, 1961 during the year under consideration, the account copies of the parties to whom the payments made toward the purchase of land was enclosed. In this regard, it is submitted that the payment for purchases are made otherwise than by an account payee cheque within the limits specified under the provision of law. Further the assessee

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submitted that the payment was made for purchase of agricultural land which cannot be regarded as expenditure within the meaning of Sec.40A(3) until the land is converted according to prevailing law. It is further submitted that the payment made toward purchase of agriculture land is an asset until the same is sold. The unsold land cannot be regarded as expenditure but the same will have to be shown as an asset in the balance sheet. Therefore, until the sale deed is executed and registered the amount paid toward purchases of the land cannot be regarded as an expenditure referred to in Section 40A(3). In this regard, the assessee has relied the decision of Hon'ble ITAT Delhi in the case of Kashi Ram Madan Lal vs. ITO, reported in 3 ITD 290 in which it has been held that the Sec.40A(3) is not attracted in the case of capital expenditure. The assessee has further submitted that apart from the non availability of the banking facility the consideration of the business expediency and other relevant factors are also applicable for deciding the applicability or non-applicability of Sec.40A(3). The assessee has further stated that it is engaged in the business of purchase and sale of land and real estate. It is impossible to carry on the aforesaid business of the real estate without at least occasionally receiving/paying money in cash in relation to transaction of the land. Such payments are not only necessary in the interest of the business expediency but it becomes a business necessity in relation to some transactions. Further, the assessee has stated that the said second proviso also recognizes other relevant

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factors. The other relevant factors will surely include cases where it is impracticable or impossible to make cash payment relating to purchase/sale of the land or other immovable property. In this regard the assessee has relied various decisions. Further, the assessee has stated that disallowance of the cash payment made for purchase of land by invoking Sec.40A(3) will result in levy up tax on gross sale value of the land and not on the real income derived by way of profit on sale of land and this will clearly violate the concept of the levy of tax on real and actual income and not on gross receipt. Therefore, the disallowance u/s 40A(3) in respect of the cash payment made on account of business expediency and business necessity are therefore, clearly covered by the exceptional provided in second proviso to Sec.40A(3). In this regard, the appellant has relied the decision of Hon'ble MP High Court in the case of CIT Vs. Bal Chand Ajit Kumar reported in 263 ITR 610 (MP) and CIT Vs. President Industries, reported in 258 ITR 654 (Guj).

8. The ld. CIT(A), considering the explanation of the assessee in the light of the findings of the AO and several other decisions confirmed the order of the AO and dismissed the grounds of appeal of the assessee. His findings in the appellate order from para 4.3 to 4.3.1 are reproduced as under :

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"4.3 I have considered the submission of the appellant and order/report of the Assessing Officer and I find that appellant is dealing in real estate and he is engaged in the business of developer and builder of real estate. During the course of the assessment proceeding, the Assessing Officer has noticed that the appellant has made the payment of Rs.1,90,60,000/- in cash for purchase of land. The Assessing Officer has made disallowance of Rs.1.12 crores (Rs.1,90,60,000/- - Rs.78,60,000/-) for the payment made during the year. The appellant has taken argument that the payment has been made for purchase of agriculture land, so until the land is sold the expenditure cannot be referred to in Sec.40A(3) is not acceptable being as already mentioned that the appellant is dealing in real estate and the land purchased is stock in trade, therefore, the payment made for land purchase is clearly contravention of Sec.40A(3). Further, the appellant has stated that each payment has been made which is below Rs.20,000/-. The appellant has purchased a chunk of land from the person concerned and it is only the payment which has been staggered over a period of time. The idea behind the introduction of such provision was to curb the transaction in cash. However, a limit was specified so that small traders, businessman do not feel the pinch of the provision and their small day to day activity are not effect. The explanation of the appellant my be applied to a case where each bill is for less thanRs.20,000/- and the payment for such bill is being made in cash. Here the appellant has credited whole amount (1,80,60,000/- + Rs.10,00,000/-) in the accounts of the above mentioned persons and then has shown cash payment of less than Rs.20,000/- in a day. At the year end a credit balance of Rs.78,60,000/- has been carried forward to next year. Thus, it is not a case of each bill being less than Rs.20,000/-. The whole payment for purchase of one chunk of land is not less than Rs.20,000/-. It is only the payment which has been staggered over a period of time. The appellant has made these payments below Rs.20,000/- on various occasions so that the provision of this section should not affect it. Further, the appellant has also argued that payment was required due to non availability of banking facility and consideration of business expediency and other relevant factor also applicable. The argument of the appellant in this is also not tenable as one of its payment of Rs.10,00,000/- was made through cheque to the same person. Therefore, it is not correct to argue that due to non availability of banking facility the payments

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were made in cash. Regarding business expediency, the appellant has taken only argument but supporting evidences were not furnished before the Assessing Officer or before the undersigned that what the urgent need which required to payment made in cash. Actually, the appellant has made the payment on various occasions and it cannot be said that there was urgent need on each and every day when payment was made. Further, the appellant also stated regarding other relevant factors that it will surely include cases where it is impracticable or impossible to make cash payment relating to purchase/sale of land or other immovable properties, therefore, all the judgments on old rule 6DDJ prior its omission where cash payment were made on account of impracticability or impossibility of payment by cheque and other compelling reasons still continued to be valid justification in view of the exemption so carved out in second proviso of section 40A(3). In this regard, it is observed that provision of 6DD(J) was omitted by the Finance Act, 1995 w.e.f. 1.4.1996. First proviso to Sec. 40A(3) provides that no disallowance shall be made u/s 40A(3), where any payment in sum exceeding Rs.20,000/- is made other than a account payee cheque drawn on a bank in such cases and such circumstances as may be prescribed having regard to the nature and extent of banking facility available, consideration of business expediency and other relevant factors. The appellant has not mentioned impracticability or impossibility of payment by cheque and other compelling reasons which enable it to make payment in cash. It is also not acceptable because appellant's has not specified Rule 6DD(J) under which the appellant's case falls. Therefore, under this situation, applicability of the cases relied by the appellant cannot be liked to the facts of the present case and the argument in this regard is rejected. Further, I also rely the decision of Hon'ble Rajasthan High Court, in the case of Nahgi Lal vs. CIT, reported in 167 ITR 139 (Raj) where on the issue of disallowance u/s 40A(3) under Rule 6DD(J), it is held that it is not sufficient for the assessee merely to establish that the purchases were genuine and the payments were identifiable. The assessee is further required to prove that due to exception and unavoidable circumstances, or because payment by cheques was not practicable, cash payments were made. Further, the Hon'ble Gujarat High Court in the case of Associated Engineering Enterprises. vs. CIT, reported in 216 ITR 366 (Guj) held on the issue of disallowance u/s 40A(3) regarding exception and unavoidable circumstances that

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certificate given by the payee does not even remotely indicate any genuine difficulty faced by parties necessitating cash payments. It cannot be said that cash payments were made by the assessee due to any exceptional or unavoidable circumstances as envisaged by cl(j) of Rule 6DD, It is also held that it is not merely the genuineness of the transaction but also the existence of the circumstances warranting payments by cash which is required to be proved.

4.3.1 The appellant also before the Assessing Officer pleaded that person receiving money insisted for payment though cash only. For this purpose, the appellant has not submitted corroborative evidences before the Assessing Officer or before the undersigned. In this regard, the Hon'ble MP High Court has decided in the case of Bhilai Motors Vs. CIT reported in 167 ITR 147 that where the assessee produced a mere statement that the seller insisted upon cash payment, the Tribunal held justified in sustaining disallowance made by the ITO u/s 40A(3). Further, the Hon'ble A.P. High Court has decided in the case of Jyothi Chellaram vs. CIT, reported in 173 ITR 358 that cash payment in excess of the specified limit made by the assessee through bearer cheque could not be held allowable on a mere unilateral statement of the assessee that the sellers insisted on cash payment without any corroborative evidences. Further, I also rely the decision of Hon'ble M.P. High Court in the case of Sh. Radhika Prakashan (Raipur) P. Ltd. vs., CIT, reported in 257 ITR 675 (MP) where it is held that "Tribunal has recorded the findings that the assessee had failed to furnish any evidence in support of the explanation that the payee had insisted on payment in cash. There is further finding that the assessee had consciously split up the payments in seal parts so as to circumvent the provisions of law. Finding based on appreciation of evidence. Not shown to be perverse or unreasonable. Appeal dismissed in limine". Facts of the case of Shri Radhika Prakashan (Raipur) P. Ltd. are squarely applicable to the present case. Considering the above decisions and facts discussed, the appellant's case does not fall either in exceptional circumstances provided in Rule 6DD(J) or in 6DD. So plea taken by the appellant is not acceptable.

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In view of the above discussion, I hold that the Assessing Officer rightly made the disallowance u/s 40A(3). The ground of appeal in this regard is dismissed."

9. The ld. counsel for the assessee reiterated the submissions made before the authorities below and submitted that though the assessee deals in real estate, but unless and until the land is converted into urban land and user thereof for non-agricultural purpose is allowed, the provisions of section 40A(3) cannot be applied in respect of purchase of agricultural land. Further regard should be had of the nature and extent of banking facility available and consideration of business expediency and other relevant factors and relied upon the order of the ITAT, Jaipur Bench in the case of Shri Salasar Overseas Pvt. DCIT, 66 DTR 9. He has submitted that genuine and bona fide transactions should not be considered for the purpose of making the addition. He has relied upon the decision of Hon'ble Supreme Court in the case of Atar Singh Gurumukh Singh, 199 ITR 667. The proviso to section 40A(3) would apply in the case of the assessee. PB-53 to 86 are the lists of payments staggered in several part payments ranging from 15,000/-, Rs.18,000/-, Rs.19,000/- and Rs.20,000/- everyday. He has also relied upon the order of ITAT, Jaipur Bench in the case of Pack India vs. ACIT, 38 ITD 01. He has submitted that Rule 6DD(f) is exception of rigor of section 40A(3) and relied upon the decision of Calcutta High Court in the case of CIT vs. CPL Tannery, 318 ITR

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179 (Cal.). He has also relied upon the decision of Rajasthan High Court in the case of Kantilal Purshottam & Co. vs. CIT, 155 ITR 519 and order of ITAT Ahmedabad Bench in the case of Trivedi Corporation Pvt. Ltd. dated 13.01.2010 on the proposition that when the genuineness of the payments had been established, the default was only technical. Therefore, the assessee was entitled for exemption u/r. 6DD of the IT Rules. He has also relied upon certain other decisions in the list of case laws that the addition could be made of real income earned. The transactions are supported by sale deed and identity of the payees is also known to the department. He has relied upon the decision of Delhi High Court in the case of Union Agencies, 166 ITR 529 in which it was held that large quantities of goods are involved daily and it would, therefore, be impracticable to carry on such business through cheque payments. Therefore, disallowance u/s. 40A(3) rightly deleted. The ld. counsel for the assessee, therefore, submitted that the business exigencies and other relevant factors as provided in exception Rule 6DD may be considered favourably to the assessee and addition may be deleted.

10. On the other hand, the ld. DR relied upon the orders of the authorities below and submitted that the assessee deals in the business of real estate and is a builder. He has purchased land worth Rs.5.37 crores and made sales of Rs.5.84 crores and the assessee made purchase of land from two parties only and no evidence was

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filed before the authorities below that both these parties insisted for cash payments. He has submitted that the details of cash payment submitted at Paper Book page 53 to 86 support the findings of the authorities below that almost daily payment is made to the sellers of the amounts in cash, which is staggered to small payments of Rs.15,000/-, Rs.18,000/-, Rs.19,000/- and Rs.20,000/- every day, which is impossible and impracticable. He has submitted that the payments have been staggered to circumvent the provisions of law and could not be treated as genuine payments. No exception has been specifically explained in Rule 6DD of the Income-tax Rules, in which the case of the assessee would fall. He has relied upon the order of the ITAT, Allahabad Bench in the case of Ingenieurs & Agents vs. ITO, 5 ITD 696, wherein it was held –

> "*Where the assessee made payments in cash for less than Rs.2,500 more than once on the same day to the same party under continuous voucher Nos. aggregating to more than Rs.2,500, disallowance under s. 40A(3) was rightly made.*"

10.1 He has submitted that the decisions cited by the ld. counsel for the assessee are not applicable to the facts of the case.

11. We have considered the rival submissions and the material available on record. There is no dispute about the facts noted above in this order. The assessee is dealing in Real Estate and land purchased is stock in trade. Therefore, the

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payment made for purchase of land is expenditure in the business of the assessee and attract the provisions of section 40A(3) of the IT Act. It is also admitted fact that the assessee has purchased chunk of land from parties mentioned above and it is only the payment, which has been staggered over a period of time. Thus, the land is stock in trade of the business of the assessee and was not merely an asset. The assessee pleaded before the authorities below that the parties insisted for cash payment, therefore, the cash payment is made on different dates, but the plea taken before the authorities below have not been established by any evidence or material on record or confirmation from the parties. The assessee has credited the whole amount in the account of the above parties and have staggered the payment almost every day at less than Rs.20,000/- in a day and further credit balance was carried forward in the next year. Therefore, it is not a case of the assessee that each bill was less than Rs.20,000/-. The whole payment of purchase of land is not less than Rs.20,000/-. It is only the payment, which has been staggered over a period of time. PB-53 to 86 are the details of cash payment in which almost everyday payments have been made in a sum of Rs.15,000/-, Rs.18,000/-, Rs.19,000/- and Rs.20,000/-. The assessee failed to prove that the bank facility is not available on each day when cash payment is made. No business expediency is also proved as to why every day cash payment is made in installments. It is difficult to believe that villagers from Choka Village would come everyday almost in whole of the year to

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collect the petty payments at Jodhpur for sale of land. The distance between village Choka and Jodhpur is more than 10 K.M. and rather it is risky for the villager to go everyday to Jodhpur to collect payment in installment and to return to his village with cash. Thus, the assessee deliberately staggered the part payment to circumvent the provisions of law. The explanation of the assessee is not supported by any evidence or confirmation that the concerned parties insisted for cash payment everyday in whole of the year. The books of account of the assessee are, thus, manipulated in such a way which suits to the convenience of the assessee. Hon'ble M.P. High court in the case of Shri Rashika Prakashan (Raipur) Pvt. Ltd. 257 ITR 675, dismissed the appeal of the assessee. In this case, before the Assessing Officer, it was submitted that the payments were made number of times in a day and each transaction was below Rs.10,000/- and the provisions of section 40A(3) are not attracted. The AO, however, did not accept the contention of the assessee. The Tribunal recorded a finding of fact that the assessee has failed to furnish any evidence in support of the explanation that the party insisted on payment in cash and it had consciously split up the payment so that each payment did not exceed Rs.10,000/-, only to circumvent the provisions of law. Accordingly, the addition was confirmed. Hon'ble High Court dismissed the appeal of the assessee.

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11.1 Hon'ble Punjab and Haryana High Court in the case of Aggarwal Steel Traders vs. CIT, 250 ITR 738, considering the Board's Circular on Rule 6DD held-

> "Held, *(i) that the explanation rendered by the assessee in respect of the payments of Rs.24,000 and Rs.40,000 would be covered by the exceptional circumstances as provided in the Board's circular, yet that by itself would not entitle the assessee to claim the relief. There is a further requirement provided in the Board's circular itself of furnishing a confirmatory letter from the concerned parties. Admittedly, no such letter in the above terms had been furnished by the assessee. Hence, the Tribunal was justified in sustaining the addition ofRs.64,000 in view of the provisions of section 40A(3) read with rule 6DD of the Income-tax Rules, 1962."*

11.2 The assessee did not produce sale deed or the agreement during the course of arguments to prove that part cash payments were made in installments for purchase of land. If it was advance money given to the villagers for purchase of land in installment, there was no necessity to make payment in cash in installment. It could be paid by cheques/drafts. Further if the amount was paid at the time of execution of sale deed, the villager/seller would not accept cash payments in installments everyday during the whole year after the execution of sale deed. Therefore, it is clear that the books of account of the assessee have been manipulated to circumvent the provisions of law. The assessee has, thus, failed to prove genuine payments in installments to the villagers in cash. Hon'ble Supreme Court in the case of CIT Vs Shri Durga Prasad More 82 ITR 540 and in the case of Smt. Sumati Dayal Vs CIT 214 ITR 801 held that "the Courts and Tribunals have to judge the

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evidences before them by applying the test of human probabilities after considering the surrounding circumstances."

11.3 Regarding the business expediency, the assessee has not filed any evidence before the authorities below and nothing is clarified as to what were the other relevant factors, for which the cash payment has been made and no specific Rule has been explained u/r 6DD, which is applicable to the case of the assessee. The ld. counsel for the assessee argued that for purchase of agricultural land and payment made to the villagers, the provisions of section 40A(3) may not be applied as provided in exception to Rule 6DD. We have gone through the Rule 6DD applicable now and prior to amendment also, in which none of the exception has been provided for making payment in cash for purchase of land. It is, however, provided that above rule can be avoided if payment is made for purchase of agricultural produce which is not the case of the assessee at all. The assessee is dealing in real estate and in land and as such, it was for the assessee to establish that the cash payments have been made for business exigencies, which the assessee has failed to prove in this case. Further Rule 6DD(j) would not apply in this case because the assessee failed to prove that on the date of payment whether banks were closed either on account of holiday or strike. The ld. CIT(A), therefore, rightly noted in his finding that the assessee has not satisfied as to under which

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Rule, the assessee's case would fall. In the case of Trivedi Corporation Pvt. Ltd. (supra), ITAT Ahmedabad Bench considered the issue of disallowance u/s. 40A(3) in respect of cash payment made to Gujrat State Electricity Board, which was considered as one of the undertaking of the State Government. Therefore, it was considered to be a payment made to Government Body and was falling in exception. The case law cited by the ld. counsel for assessee would not support the case of the assessee because they are based on their own facts and that the theory of real income would not apply for dealing with the issue of section 40A(3) of the IT Act. Considering the facts and circumstances and above discussion, it is very clear that the assessee consciously split up the payments in whole of the year, which is impracticable, illogical as noted above and it was done just to circumvent the provisions of law. There was no justification for the assessee to split up the transactions of crores of rupees in small payments of Rs.15,000/- to Rs.20,000/- everyday. Whatever plea was taken before the authorities below was not supported by any evidence. Therefore, the assessee failed to prove any business expediency or other facts for making staggered payments in cash. The case of the assessee would not fall in any exception to Rule. The assessee deliberately and consciously split up the payments in part so as to circumvent the provisions of law. We, therefore, do not find any justification to interfere with the orders of the authorities

below. There is no merit in these grounds of appeal by the assessee. Same are accordingly dismissed.

12. On ground No. 6, the assessee challenged charging of interest u/s. 234A, 234B and 234C and this ground is not argued by the ld. counsel for the assessee. Otherwise also, charging of interest is mandatory and consequential in nature. Therefore, this ground is, accordingly, dismissed.

13. No other point is argued or pressed.

14. In the result, the appeal of the assessee is dismissed. Stay granted is vacated.

Order pronounced in the open court.

Sd/-	Sd/-
(A.L. GEHLOT)	**(BHAVNESH SAINI)**
Accountant Member	Judicial Member

*aks/-
Copy of the order forwarded to :

1. Appellant
2. Respondent
3. CIT(A), concerned
4. CIT, concerned
5. DR, ITAT, Jodhpur
6. Guard file

By order

Asstt. Registrar

True copy