

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER**

ITA No. 246/Hyd/2011
Assessment Year: 2007-08

Sahitya Housing Pvt. Ltd., vs. Dy. Commissioner of
Hyderabad. Income-tax, Circle – 3(1),
PAN – AAICS 7065 A Hyderabad.

Appellant

Respondent

Appellant by: Sri S. Rama Rao
Respondent by: Sri P. Soma Sekhar Reddy

Date of hearing: 04/12/2013
Date of pronouncement: 24/01/2014

ORDER

PER CHANDRA POOJARI, AM:

This appeal preferred by the Assessee is directed against the order of the CIT(A)-IV, Hyderabad dated 30/11/2010 for the assessment year 2007-08 wherein the assessee has raised the following substantial grounds:

“2. The learned CIT(A) erred in confirming an addition of Rs. 4,09,98,105/- being the payments made to the agriculturists for purchase of agricultural lands made by the Assessing Officer u/s 40A(3) of the Act. The learned CIT(A) failed to see that the payments are covered by the exceptions mentioned in Rule 6DD of the IT Rules and, therefore, is not justified in confirming the addition.

3. The learned CIT(A) erred in confirming an addition of Rs. 1,30,00,000 made by the Assessing Officer u/s 68 of the IT Act. The CIT(A) ought to have considered the explanations submitted before him and allowed the ground.”

2. Briefly the facts relating to the ground No 2 with reference to addition of Rs. 4,09,98,105/- are that the assessee is carrying on real estate business of developing land into housing plots. A survey operation u/s 133A was conducted in Assessee's case on 17/03/2008. It was found that payments for purchase of lands had been made to the tune of Rs. 20,49,90,525/-, in cash, to various persons, in excess of Rs. 20,000/-, violating the provisions u/s 40A(3) of the Act. During the course of assessment proceedings, the assessee was asked to explain as to why these payments should not be disallowed u/s 40A(3), since the land forms the stock in trade in the assessee's business. In reply, justifying the cash payments, the assessee initially relied on clause (g) of Rule 6DD. Later on, the assessee quoted the clause (h), which excludes payments made in a village or town, which on the date of such payment is not served by any bank to any person who ordinarily resides, or is carrying on any business, profession or vocation in any such village or town from the ambit of section 40A(3). The assessee further averred that the persons to whom payments were made are residents of various villages and that they were not served by banks.

3. However, the Assessing Officer on random verification of the banking networks of Andhra Bank and State Bank of Hyderabad observed that these banks have their branches, either in the same area or in the vicinity. The Assessing Officer had also enclosed evidence regarding the existence of branches at these places in the form of down loaded statements from the web sites of Andhra Bank and State Bank of Hyderabad. Besides, he also noted that the claim of the assessee that the payees concerned carried on the business profession or vocation in any such village or town was also not correct, as Sri S. Shankar Prasad, to whom Rs. 6,42,000/- was

paid in cash in respect of Aditya Residency, was the resident of Rajahmundry Town, which is well served by banking facilities. Similarly, Sri N. Suresh Prasad Reddy, to whom cash payment of Rs. 4,82,55,000/- was made, also was the resident of Kamalapuri Colony of Hyderabad City. Accordingly, rejecting the claim of exception of cash payments under Rule 6DD of clause (h), 20% of cash payments of Rs. 20,49,90,525/- amounting to Rs. 4,09,98,105/- was disallowed u/s 40A(3) of the Act. On appeal, the CIT(A) confirmed the addition made by the Assessing Officer.

4. Aggrieved, the assessee is in appeal before us.

5. The learned AR submitted before us that the assessee's case falls under the purview of provisions of section 6DD(1). According to the learned counsel, the assessee made payments to the villagers, who sold the land where there is no banking facility. He submitted that the first cash payment was made to Vadla Venkata Chary and three others in relation to Balaji Gardens property of Rs. 60,000/-. This property was situated in Reddi Pally Village, Moinabad Mandal and an amount of Rs. 60,000/- was paid to 4 persons cannot fall u/s 43D of the Act.

6. Regarding Aditya Residency property, he submitted that Rs. 10,80,000/- was paid to Smt. M. Pochamma, who is residing where the property is situated at Theegapur Village, Kothur Mandal. According to the learned AR, Theegapur is a Village, which falls under the exception category mentioned in Rule 6DD(g). Regarding another Rs. 6,42,000/- was paid to Sri S. Shankar Prasad and the property situated in village Kotavumman, which is not covered by banking facility.

7. As regards Nature Park property, the AR submitted that an amount of Rs. 1,18,56,250/- was paid to Sri B. Chinna Butchiaiah, as the property situated at Rangapur Village, Kothur Mandal, which is not covered by banking facility. Another payment of Rs. 26,00,000/- was paid to Sri G. Hari Shankar, whose property was situated at Salivendragudem Village, Kothur Mandal, which is not covered by banking facility. The payment of Rs. 88,21,100/- made to Sri Nawabpet Narayana, whose property was situated at Rangapur Villae, Kothur Mandal is not covered by banking facility. Another payment of Rs. 1,14,82,500/- was made to Sri P. Angaiah & Venkataiah, whose property was situated at Rangapur Village, Kothur Mandal, does not have bank facility. Another payment of Rs. 6,00,000/- was made to Sri P. Kistaiah, whose property was situated at Rangapur Village, Kothur Mandal, does not have bank facility. As regards the payment of Rs. 1,00,000/- made to Sri Raja Gopal, whose property was situated at Rangapur Village, Kothur Mandal, does not have bank facility.

8. As regards the Pearl City property, the AR submitted that an amount of Rs. 15,60,000/- was paid to Sri E. Narayana, whose property was situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility. Another payment of Rs. 67,60,000/- was made to Sri K. Chandramma and two others, whose properties were situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility. Another payment of Rs. 31,36,000/- was paid to Sri K. Krishna Reddy, whose property was situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility. As regards the payment of Rs. 7,39,85,250/- was made to Sri K. Narasimha Reddy and five others, whose

properties were situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility.

9. As regards the Pearl City-II property, the learned AR submitted that the payment of Rs. 1,45,00,000/- was made to Sri CH Malla Reddy and 9 others, whose properties were situated at at Mekaguda Village, Kothur Mandal, which is not covered by banking facility. Another payment of Rs. 16,00,000/- was made to Sri Mahammad Saab & Sons, whose property was situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility.

10. As regards Pearl City (OL) property, the AR submitted that an amount of Rs. 55,50,000/- paid to Sri Y. Sattaiah, whose property was situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility. Another payment of Rs. 74,87,425/- was paid to Sri D. Jangaiah and three others, whose properties were situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility.

11. As regards the Pearl City – III property, the AR submitted that an amount of Rs. 28,50,000/- was paid to Smt. G. Lakshmi, whose property was situated at Palmakula Village, Shamshabad Mandal, does not have banking facility. Another payment of Rs. 15,25,000/- was paid to Sri M. Rangaiah and three others, whose properties were situated at Mekaguda Village, Kothur Mandal, which is not covered by banking facility.

12. On the other hand, the learned DR submitted that the payments to those parties do not fall under the purview of the provisions of Rule 6DD(g) of the Act, as according to him, the

payments are not made in villages and all the sale deeds executed in Hyderabad. Being so, the payments are made in Hyderabad where there is a banking facility and the property situated at village is not relevant. As regards application of Rule 6DD(g), according to him, strict principles of law to be applied under these provisions. For this purpose, he relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Gwalior Rayon Silk Manufacturing Co. Ltd., reported in 196 ITR 149. He also relied on the orders of the lower authorities.

13. We have heard the arguments of both the parties, perused the record and have gone through the orders of the revenue authorities. Sec 40A(3) reads as under:

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 expenditure and other relevant factors.

14. The exceptions to the application of sec 40A (3) is laid down in Rule 6DDJ. Rule 6DD after its amendment from 1995, reads as under:

Rule 6DD

Prior to 25.7.1995, clause (j) of Rule 6DD of the IT Rules read as follows:

6DD.....

i) in any other cause, where the assessee satisfies the Assessing Officer that the payment could not be made by a cross cheque draw on a bank or by a drawn on a bank or by a crossed bank draft.....

*(1) due to exceptional or unavoidable circumstances or
(2) 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 Assessing Officer as to the genuineness of the payment and identity of the payee”.

The above clause (j) of Rule 6DD has been omitted by the IT (fourteenth amendment) Rules 1995 w.e.f. 27.5.1995. It is pertinent to refer at this juncture, to the decision of Hon'ble Andhra Pradesh High Court in the case of Smt. Ch. Mangayamma Vs. Union of India and others (239 ITR 687), wherein considering the constitutional validity of the provisions of S.40A(3) of the Act in the light of the above amendment made to Rule 6DD of the IT Rules, the Hon'ble High Court observed and held at page 693 of the Reports (239 ITR) as follows:

“In view of the aforesaid principles as laid down and the object as sought to be achieved u/s 40A(3) of the Act, any changes made in the subordinate legislation would not in any way affect the substantive provision. Moreover, by deleting the circumstances as contemplated earlier, viz., sub clauses (1) and (2) of rule 6DD(j) the objects of curbing the circulation of black money and regulating the business transactions become more strengthened and it avoids any undue advantage being taken by unscrupulous assesseees or litigation being multiplied. As the position stands now 20% of the cash transactions exceeding Rs.20,000 are disallowed in computing the business expenditure but not the entire Rs.20,000/- While the amended provision confers advantage to the assessee to this extent, the circumstances permitted to be taken into account by the Assessing authority are no longer available by reason of deletion of old rule 6DD(j). But that by itself does not make section 40A(3) arbitrary and unconstitutional. One cannot plead ignorance of law and make cash payments contrary to law. It is too late in the day to accept any such proposition. Furthermore, in the present day banking scenario, the mode of payment by way of crossed cheques or demand drafts cannot be said to be onerous duty case on an assessee which can be made a foundation for attacking the validity of the said section. Therefore, it is not open for attacking the provision as violative of any provision of the constitution. There is no arbitrariness or discrimination in the said provision warranting interference by this court under the circumstances.

In view of the above there is absolutely no merits in the challenge made as to the validity of section 40A(3) of

the Act by mere deletion of sub clauses (1) and (2) of rule 6DD(j). The said provision is perfectly valid and we may hasten to add that the deletion of sub clauses (1) and (2) of rule 6DD(j) is only a step forward in the achievement of the avowed object envisaged u/s 40A(3) of the Act.

15. Therefore the only exception that the Assessee can claim is when payments are required to be made on days when the Banks were closed on account of holidays or strike. Transactions after the banking hours in the course of regular business will not fall within this exception. In those transactions, the payment is not required to be made when the banks are closed i.e. after banking hours. Further the purpose of the disallowance u/s 40A (3) is to dissuade transactions by cash.

16. Sec 40A(3) itself provides that the exceptions will have to be prescribed having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors. Taking all these factors, considering the nature of activity of the Assessee and the necessity for them to pay cash to the land owners we are of the opinion that the condition under Rule 6DD for exemption viz., transactions should have taken place on Bank Holidays should be read down in the case of the Assessee.

17. In the case under consideration, no banking facility is available where the properties were purchased by Assessee, therefore, there was no choice for the assessee except to make the payments in cash due to exceptional or unavoidable circumstances as provided under Rule 6DD. In view of the above discussion, we set aside the order of CIT(A) and delete the addition of Rs. 4,09,98,105/- made u/s 40A(3) of the Act.

18. As regards ground No. 3 pertaining to addition of Rs. 1,30,00,000/-, the Assessing officer observed that during the course of survey proceedings, while recording the statement of Sri T. Veeraiah Chowdary, MD of the assessee company, regarding the cash payment of Rs. 1.30 crores made to Sri RTV Prasad, he simply stated that he was unable to explain the same. Hence, the Assessing officer added the said amount u/s.68 of the Act.

19. During the course of appellate proceedings, the representative of the appellant submitted that the Managing Director of the appellant company had admitted income in his individual capacity for the assessment year 2006-07 with regard to the subject matter and the same was again reconsidered for addition u / s. 68 in the hands of the appellant, which amounts to levying tax twice on the amount. It was submitted that the said amount of Rs. 1,30,00,000/ - had been invested by Sri T. Vecraiah Chowdarv, the Managing Director of the appellant company. Sri Chowdary had admitted the said investment in his return for the A.Y. 2006-07.

20. Vide further submissions, the representative contended that the actual amount found during the course of survey against the name of Sri T. Veeraiah Chowdarv was Rs. 1,05,00,000/ - only and not Rs. 1.30,00,000/-. In the Assessment order in the case of Sri Chowdary, the addition of Rs. 1.05 crores was accepted, as the amount paid was Rs. 1.05 crores only and not Rs. 1.30 crores. He averred that the actual amount as per the impounded material was only Rs. 1.05 crores and having been assessed in the hands of

Sri Chowdary, the same could not have been added in the hands of the appellant once again. The representative also furnished a copy of the assessment order in the case of Sri T. Veeraiah Chowdary for the A.Y. 2006-07, along with a copy of letter dated 18.12.2008 filed by the appellant's representative before the DCIT Circle 3(1) Hyderabad . After considering the submissions of Assessee, the learned CIT(A) held as follows:

“9. I have gone through the submission of the appellant and the facts of the case. From the letter of the appellant's representative dated 18.12.2008, addressed to the DCIT Circle 3(1), Hyderabad, it is seen that the appellant had admitted that due to contingencies in the market, he had obtained funds to the extent of Rs. 1,05,00,000/- from various persons and that he was not in a position to give details to establish the same. Accordingly, he had admitted the said amount as income as his income. As seen from the Assessment order in the case of Sri T. Veeraiah Chowdary for the A.Y. 2006-07, the amount of Rs. 1,05,00,000/- was considered as unexplained in his hands.

9.1 From the said Assessment order, however, it is seen that during the course of survey in the case of the appellant company, a Pen Drive had been found with the accountant of the company. On verification thereof, certain transactions relating to 'TVR' were found, which stood for Sri T. Veeraiah Chowdary., The transactions in the said Pen Drive showed that the following amounts and interest had been paid to one individual, Sri R. T. V.Prasad.

Sr. No	Date	Name	Amount (Rs)	Due date	Interest	Feb
1	01.01.06	RTV Prasad	1,05,00,000	1	780000	Paid
2	24.12.07	Ref	REF	24	467500	22.02.08
3	29.10.07	Ref	1,00,00,000	29	450000	22.02.08
4	01.02.08	Ref	1,65,00,000	1	930000	29.02.08
TOTAL			2,70,00000		2627500	

*9.2 It was stated by Sri Chowdary that the land pertained to Pearl City - 11 venture, and had been purchased in the name of Sri R. T. V. Prasad. In the reply dated 19.12.2008, the authorized representative of the appellant had stated before the Assessing officer that he was not in a position to establish the funds to the extent of Rs. 1,05,00,000/- mentioned above and therefore the same had admitted as income in the hands of the appellant. However, the amount of Rs. 1,30,00,000/-, added in the case of the present appellant had been admitted as unexplainable in the sworn statement of Sri Chowdary recorded on 24.03.2008 itself. As seen from the assessment order itself, the appellant had made the cash payment of Rs. 1.30 crores to Sri R T V Prasad on 10.11.2006. On the contrary, it can be seen from the chart reproduced above that the payment of Rs. 1,05,00,000/- to Sri R T V Prasad was made on 1.1.2006 itself. Therefore, it is clear that the payment of Rs. 1,30,00,000/- was a different payment and was made on a subsequent date. The appellant therefore, is not right in contending that the amount as per impounded material was Rs. 1,05,00,000/- only. Obviously, the appellant has not been able to explain the source of the said payment of Rs. 1,30,00,000/- to Sri R T V Prasad on 10.11.2006. Accordingly, I do not find any infirmity in the addition of the said amount by the assessing officer. Therefore, **ground No.s 11 to 13 are also decided against the appellant.**"*

21. Before us, the learned counsel submitted that these payments are relating to Sri T. Veeraiah Chowdhary and not relating to Assessee. Whatever the entries relating to these payments are found in the Pendrive was taken and considered in the hands of Sri T. Veeraiah Chowdhary for AY 2006-07 and there is no entry for Rs. 1,30,00,000/- in the hands of Assessee as other four entries are considered in the case of Sri T. Veeraiah Chowdhary and the same material found in the Pendrive. According to the AR, the department is playing a dual role.

22. On the other hand, the learned DR submitted that the entry found in the pendrive not only relating to Sri Veeraiah Choudhary but also relating to Assessee and whatever is relating to Sri Veeraiah Choudhary was considered in the hands of Sri Veeraiah choudhary and the balance of Rs. 1,30,00,000/- was considered in the hands of Assessee as there is no reasonable explanation from Assessee.

23. We have heard the arguments of both the parties and perused the record as well as gone through the orders of the revenue authorities. In this case, the entry found in Pendrive was considered in the case of Sri Veeraiah Choudhary for AY 2006-07. It is also brought to our notice that vide letter dated 18/12/2008 Shri T. Veeraiah Chowdhary through his auditor brought to the notice of the DCIT, Circle 3(1) that the actual amount as per the impounded material was only Rs. 1.05 crores and not Rs. 1.30 crores and the said amount was offered for taxation in the hands of Shri T. Veeraiah Choudhary in AY 2006-07. A copy of the said letter was kept on record vide page 34 of the paper book. The assessment order for AY 2006-07 also suggests that the addition of Rs. 1.05 crores was only made in the assessment of Shri T. Veeraiah Chowdhary. This same entry pertaining to the amount of Rs. 1,30,00,000/- was considered in the hands of Assessee, though there is no positive material found in the course of survey to suggest that this entry pertains to Assessee. Being so, in our opinion, mere guess work is not possible while framing assessment without any proper material. The Assessing Officer shall have the basis for assuming the unexplained credit in the case of the assessee and it is not possible to assess the income of the assessee in the absence of any evidence on arbitrary basis. The

unsubstantiated material found in the pendrive cannot be considered in the hands of the assessee as a conclusive evidence so as to make additions towards unexplained credit. It was held by the Hon'ble Supreme Court in the case of CBI Vs. V.C. Shukla [1998] 3 SCC 410 that “ *file containing loose sheets of paper are not books*” and *entries therein are not admissible u/s 34 of the Evidence Act, 1872.*” In the present case, the pendrive found during the course of survey proceedings in the case of T. Veeraiah Choudhary, M.D. of assessee company, which reflect the cash payment of Rs. 1.3 crores made to Shri RTV Prasad. The same was considered in the hands of the Sri T. Veeraiah Choudhary as an investment for the AY 2006-07. In our opinion, as this is not substantiated by any corroborative evidence to establish that the assessee is involved in this transaction, so as to make addition in the hands of the assessee. Hence, in the absence of any corroborative evidence or material to establish that the entry is pertaining to Assessee, we set aside the order of CIT(A) and delete the addition on this count. Accordingly, this ground appeal of Assessee is allowed.

24. In the result, appeal of Assessee is allowed.

Pronounced in the open court on 24/01/2014.

Sd/-
(ASHA VIJAYARAGHAVAN)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Hyderabad, dated 24th January, 2014
kv

Copy forwarded to:

1. Sahitya Housing Pvt. Ltd., C/o Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Residency, Road No. 9, Himayatnagar, Hyderabad.
2. DCIT, Circle – 3(1), Hyderabad.
3. CIT(A)-IV, Hyderabad
4. CIT-III, Hyderabad
5. The DR, ITAT, Hyderabad