



**IN THE INCOME TAX APPELLATE TRIBUNAL,  
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER  
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No. 421 & 142/CTK/2016**  
Assessment Year : 2011-2012

Sabita Panda, Rani Kothi, Khuntia Sahi, Puri.	Vs.	ITO, Puri Ward, Puri
PAN/GIR No.AMNPP 1870 C		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri P.R.Mohanty, AR  
Revenue by : Shri D.K.Pradhan, DR

**Date of Hearing : 01 /03/ 2018**  
**Date of Pronouncement : 08 /03/ 2018**

**ORDER**

**Per Pavan Kumar Gadale, JM**

These two appeals filed by the assessee are directed against the order of the CIT(A)-2 Bhubaneswar dated 24.8.2016 in the matter of assessment u/s.143(3) of the Act and dated 15.12.2016 in the matter of penalty u/s.271B of the ACT for the assessment year 2011-12.

2. In ITA No.421/CTK/2016, the assessee has agitated the confirmation of addition of Rs.53,13,007/- made under section 40A(3) of the I.T.Act, 1961.

3. The brief facts of the case are that the assessee is an individual and derives income from sale of recharge vouchers on whole sale and retail basis and filed the return of income on 30.7.2011 with total income of Rs.1,13,920/-. Subsequently, the case was selected for scrutiny under



CASS and Notice under section 143(2) and 142(1) were issued and served on the assessee and Id A.R. of the assessee appeared and case was discussed.

4. During the course of assessment proceedings, the Assessing Officer found that the assessee has made purchases from M/s. Stock Point, Prop. Uprendra Nayak, Puri. The Assessing Officer verified the ledger account of the assessee and found that the assessee has made payments exceeding Rs.20,000/- and the provisions of section 40A(3) of the Act are violated. The Assessing Officer recorded the statement of the assessee u/s.131 of the Act. The above statement was verified from Sri Uprendra Nayak, Prop. Of stock Point, Puri who has confirmed to have received Rs.70,50,839/- in cash from the assessee and no payment is received in cheque/draft. Sri Uprendra Nayak also confirmed the tally of the sales figures with the purchases by the assessee and difference in amount entered in the assessee account. Considering the over all aspects of sales and purchase, the Assessing Officer observed that the assessee's case does not fall within the exceptional circumstances as provided under rule 6DD of I.T.Rules, 1962 and assessee has violated the provisions of section 40A(3) of the Act and made an addition of Rs.53,13,007/- and passed order u/s.143(3) of the Act on 20.3.2014..

5. Before the CIT(A), the assessee filed written submissions as under:

- i) That Sri Umesh Nayak refused to accept the payments by crossed cheque and if the assessee had made cheque payments, the e-recharge voucher would have delayed by



- four to five days thereby severely affecting the business operation.
- ii) That the AO accepted the version of Umesh Nayak but disbelieved the version of the appellant on the quantum of cash payments in a day. That the relationship between the Prop of M/s. stock Point and appellant is of a principal and agent and that the e-recharge vouchers are not goods in real sense.

The assessee also relied on the judicial decision in the case of CIT vs. P Pravin & Co. (2005) 274 ITR 534 and submitted that the provisions of section 40A(3) are not attracted in her case whereas the CIT(A) confirmed the action of the Assessing Officer.

6. Aggrieved with the order of the CIT(A), the assessee has filed an appeal with the Tribunal.

7. Ld A.R. of the assessee submitted that the assessee was purchasing recharge vouchers from M/s. Stock Point, Puri and following the system of payment consistently from the earlier years and revenue has accepted further in the sale of recharge the assessee is entitled only percentage of commission/discount on sale of such vouchers and the assessee continued to make cash payment, otherwise, the business of the assessee would have affected. Ld A.R. submitted that the intention of Section 40A(3) is to prevent deduction of bogus payments and not to restrict the commercial operation and the relationship in the course of recharge vouchers, purchase and sale is of principal and agent and further the assessee has substantiated the genuineness of transaction and identity of the seller and prayed for allowing appeal and relied on following judicial decisions:



- a) Anupam Tele Services vs ITO, 366 ITR 122 (Guj)
- b) S.Rahumathulla vs ACIT, 127 ITD 440(Cochin)
- c) Doshi Vijay Kumar Motilal vs ITO, 33 ITR (Trib) 403 (Pune)

8. Contra, Id D.R. supported the orders of lower authorities. the Id DR argued that the payments made by the assessee does not fall under any of the exceptions provided in Rule 6DD of the Rules. Accordingly, he argued that no interference is called for in the order of the Id CIT(A).

9. We have heard rival submissions, perused the records of the case and orders of lower authorities. In the present case, the assessee is engaged in dealings in mobile recharge vouchers on a wholesale basis and retail basis. During the assessment year under consideration, the assessee made purchases of recharge vouchers from M/s. Stock Point, Puri and the Assessing Officer verified the ledger account of the assessee and found that a large number of payments exceeding Rs.20,000/- were made in cash in contravention of the provisions of section 40A(3) of the I.T.Act, 1961. The Assessing Officer recorded the statement of Shri Upendra Nayak, Prop. Of M/s. stock Point Puri and who has confirmed sales of recharge vouchers of Rs.70,50,839/- to the assessee and receipts of cash sales but the Assessing Officer found there is variation in the recording of entries in assessee's ledger and the assessee has violated the provisions of section 40A(3) of the Act and the CIT(A) confirmed the findings of the Assessing Officer. We find that provisions of Section 40A(3) of the Act prescribes that no deduction shall be allowed in respect



of an expenditure for which payment is made to the other person otherwise than by way of an account payee cheque or draft, in all cases where the amount exceeds Rs.20,000/-. The Assessing Officer has held that payment of Rs.53,13,007/- made by the assessee to M/s. Stock Point, Puri are made in cash and confirmed by the Prop. Mr Upendra Nayak of M/s. stock Point in his statement recorded u/s.131 of the Act and there is no dispute about the sales figure and transaction and revenue has accepted the same. Further, Ld A.R. relied on the decision of Cochin Bench of the Tribunal in the case of S.Rahumathulla (supra), wherein, on similar situation, it was held that there was only a relationship of a principal and agent and, therefore, there was no question of any purchase being affected by the latter and, accordingly, the Bench concluded that there was no question of allowance of any expenditure in respect of purchases qua which the provisions of section 40A(3) of the Act could apply, irrespective of the mode of payments. Ld A.R. also relied on the decision of Hon'ble Gujarat High Court in the case of Anupam Teleservices (supra), wherein also, the assessee was dealing in recharge vouchers and made cash payments on the ground that on account of cheque payment, it will take 4/5 days to clear the payments and, therefore, there will be an adverse impact on the financial position and business operation.



Ld A.R. of the assessee also relied on the decision of Pune Benches of the Tribunal in the case of Doshi Vijaykumar Motilal (supra), wherein, the assessee was dealing in mobile recharge vouchers on a wholesale basis and the assessee made payments in contravention of section 40A(3) of the Act and the Tribunal has deleted the addition made by the Revenue and held at para 8 as under:

“. In this context, the decision of the Cochin Bench of the Tribunal in the case of S. Rahumathulla (supra) has been relied upon by the appellant before us. In the case before the Cochin Bench, issue related to invoking of section 40A(3) of the Act in the case of assessee who was, inter-alia engaged in dealing in BSNL and other telephone cards. The payments made by the assessee towards purchases of Telephone cards were by way of cash which was sought to be disallowed by the Assessing Officer by invoking section 40A(3) of the Act. The Cochin Bench of the Tribunal, by following its earlier decision in the case of Vodafone Essar Cellular Ltd. vs. ACIT, (2009) 32 SOT 280 (Cochin), came to conclude that in such like transactions, there was only a relationship of a principal and agent and therefore, there was no question of any purchase being effected by the latter and accordingly the Bench concluded that there was no question of allowance of any expenditure in respect of purchases qua which the provisions of section 40A(3) of the Act could apply, irrespective of the mode of payments. The following discussion in the order of the Tribunal is relevant :-

“4.1 We would firstly deal with the case law cited by the assessee, as if its case is covered by the principles laid down there-under, it would stand to succeed. In the case of Eastern Condiments Pvt. Ltd. (supra), the assessee found favour with the Hon'ble jurisdictional High Court in view of the provision of rule 6DD(j) of the Rules, which provided that where the assessee satisfied the Assessing Officer that the payment(s) could not be made by crossed cheque drawn on a bank or a crossed bank draft due to exceptional or unavoidable circumstances or because the payment in the manner aforesaid was not practical, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof, also furnishing evidence to the latter's satisfaction as to the genuineness of the payment and the identity of the payee, the assessing authority had the discretion to allow the expenditure, even where there was an apparent violation of the provision, so that the Revenue's appeal contesting the order of the Tribunal stood dismissed by the Hon'ble Court”



10. We find that there is no dispute to the genuineness of the payment by the assessee and identity of the sellers. The provisions of section 40A(3) are not intended to restrict the business activities but to caution that payments exceeding Rs.20,000/- are made in cheque/draft. The provisions of section 40A(3) of the Act are to be in consonance with business expediency trade practice and other genuine relevant factors. In this present case, the assessee has intimated the circumstances under which the assessee was compelled to make the cash payments and also the genuineness of payment and the identity of the payee is not doubted. Considering the circumstances, business expediency and judicial decisions dealt above, we are of the substantive view that the provisions of section 40A(3) of the Act shall not be a hindrance in the business operation of the assessee, who has been following such pattern from earlier years and on the principle of going concern which the revenue has not doubted. Accordingly, we set aside the order of the CIT(A) and directed the Assessing Officer to delete the addition and accordingly, the ground of the assessee is allowed.

11. In ITA No.142/CTK/2017, the only effective issue before us is levy of penalty under [section 271B](#) of the Income Tax Act, 1961 (hereinafter referred to as the Act), for not obtaining the audit report as required under [section 44AB](#).

12. The brief facts are that the Assessing Officer levied the penalty for non-filing of the audit report along with return. The penalty was levied by



the Assessing officer for not obtaining the audit report as required under [section 44AB](#) of the Act by the assessee within the stipulated time. The case of the assessee is that the audit report was completed on 24.9.2011 but due to certain circumstances, the report was furnished during the assessment proceedings on 22.10.2013. According to the learned AR, the levy of penalty under [section 271B](#) is not tenable in the eyes of law, since the assessee had obtained the audit report in time but failed to file the same along with return. According to the learned A.R. the only technical breach has been committed by the assessee which is exonerable under the given facts and circumstances of the case.

13. Ld A.R. filed before us the income tax returns for the assessment years 2012-13 and 2013-14, in which the assessee has declared the commission in the return filed. He also relied on the decision of Delhi Bench of the Tribunal in the case of Anoop Kumar Beri vs ACIT, 97 TTJ 275 (Del), wherein, the facts were that the assessee was charging commission from truck owners and was under bonafide belief that such receipts were not to be included for the purpose of determining the obligation of audit under section and the department has imposed penalty u/s.271B of the Act. The Tribunal observed that bonafide belief of the assessee constituted a reasonable cause for not getting the accounts audited and, deleted the penalty imposed u/s.271B of the Act.





14. Contra, Ld D.R.relied on the orders of the authorities below and further submitted that the assessee did not obtain the requisite report within the stipulated, therefore, the penalty was rightly levied.

15. We have heard the rival submissions, orders of lower authorities and perused the material on record. The assessee was dealing in the recharge vouchers. The issue is whether the assessee had obtained the requisite tax audit report or not. The assessee has contended that although the audit report was prepared on 24.9.2011 but due to certain circumstances, it was furnished during assessment proceedings and there was no malafide intention in this regard. It is not case of the revenue that the assessee has not furnished the audit report.

16. We also find from the income tax returns for the assessment years 2012-13 and 2013-14 filed by the assessee that the assessee has shown business income from the sale of recharge vouchers and not shown as turnover. We also on perusal of the order of the Delhi Bench of the Tribunal in the case of Anoop Kumar Beri (supra) find that the assessee was under bonafide belief that receipts from commission were not to be included for the purpose of determining the obligation of audit under section 44AB and same constituted a reasonable cause for not getting the accounts audited. In the present case, the income shown by the assessee is from the commission on sale of recharge vouchers, which alone can be treated as assessee's turnover. Therefore, respectfully following the decision in the case of Anoop Kumar Beri (supra), we are of the



considered opinion that the default committed by the assessee in not presenting the audit report is exonerable and we do not find any mala fide on the part of the assessee in this way. Hence, we delete the penalty imposed u/s.271B of the Act.

17. In the result, appeals of the assessee are allowed.

Order pronounced on 8 /02/2018.

Sd/-

**(N.S Saini)**  
**ACCOUNTANT MEMBER**

Sd/-

**(Pavan Kumar Gadale)**  
**JUDICIALMEMBER**

Cuttack; Dated 8 /03/2018  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellant : Sabita Panda, Rani Kothi,  
Khuntia Sahi, Puri
2. The Respondent. ITO, Puri ward, Puri.
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY  
**ITAT, Cuttack**