

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF SEPTEMBER 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

I.T.A. NO.32 OF 2013

BETWEEN:

M/S. NAM ESTATES PVT. LTD.,
NO.150, 1ST FLOOR, EMBASSY POINT
BANGALORE-560001
(REPRESENTED BY ITS GENERAL MANAGER
ACCOUNTS AND TAXATION
SRI. D. VIJAYAKUMAR
AGED ABOUT 53 YEARS
S/O R. DHARMALINGAM).

... APPELLANT

(BY SRI. CHYTHANYA K.K. ADV.,)

AND:

THE INCOME TAX OFFICER
WARD-12(1), # 14/3, 4TH FLOOR
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD, BANGALORE-560001.

... RESPONDENT

(BY SRI. E.I. SANMATHI, ADV.)

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THIS ITA IS FILED UNDER SECTION 260-A OF I.T. ACT,
1961 ARISING OUT OF ORDER DATED 05.10.2012 PASSED IN ITA
NO.705/BANG/2011 FOR THE ASSESSMENT YEAR 2006-07,
PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

(I) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW
STATED THEREIN.

(I) ALLOW THE APPEAL AND SET ASIDE THE ORDER OF THE ITAT, BANGALORE 'C' BENCH BEARING C.O.NO.14/BANG/2012 IN ITA NO.705/BANG/2011 DATED 05-10-2012 IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA COMING ON FOR ADMISSION, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2006-07. The appeal was admitted by a bench of this Court vide order dated 10.07.2013 on the following substantial question of law:

Whether on the facts and circumstances of the case, the Tribunal was right in law in applying the provisions of Section 40A(3) of the Income Tax Act, 1961 in respect of cash payments made by the assessee to the agriculturists/farmers for purchase of land?

2. The facts leading to filing of this appeal in a nut shell are that assessee is private limited company

registered under the Companies Act, 1956 engaged in the business of real estate development. The assessee filed its return of income on 12-06-2007 declaring an income of Rs.3,48,240/-. A survey was conducted under Section 133A of the Act in the business premises of the assessee. The case of the assessee was selected for scrutiny and an order of assessment under Section 143(3) of the Act was passed on 29-12-2008 by which the Assessing Officer disallowed business expenditure to the tune of Rs.17,52,527/- holding that the payment towards purchased of land during the assessment year was hit by Section 40A(3).

3. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), who by an order dated 23-02-2011 confirmed the order of the Assessing Officer with regard to the disallowance of business expenditure of the assessee. The assessee filed its cross objections against the aforesaid order in the appeal preferred by the revenue before the Income

Tax Appellate Tribunal. The tribunal by its order dated 05-10-2012 affirmed the order of the Commissioner of Income Tax (Appeals) with regard to the disallowance of business expenditure. In the aforesaid factual background, the instant appeal has been filed.

4. Learned counsel for the assessee submitted that the purpose and intent of Section 40A(3) is to curb tax evasion by establishing the identity of the parties and the genuineness of the transaction. It is further submitted that the Tribunal has erroneously invoked the provisions of Section 40A (3) when the identity of the parties and the genuineness of the transaction were not in question. It is also pointed out that it was not the defence of the assessee that transactions took place at the place where there was no banking facility. However, the authorities have erroneously assumed the aforesaid fact and have deprived the assessee of the benefit of Section 40A(3) of the Act. It is urged that the Tribunal has failed to appreciate that the transactions were made

in cash due to the business expediency of the assessee, which exempts the expenditure incurred from the applicability of Section 40A(3) as per the second proviso to Section 40A (3). In support of the aforesaid submissions, reliance has been placed on **COPY OF CIRCULAR No.6-P, DATED 06.07.1968, COPY OF CIRULAR NO.22 OF 1969, COPY OF CIRCULAR NO.220, DATED 31.05.1977, COPY OF CIRULAR NO.717 OF 1995, 'ATTAR SINGH GURMUKH SINGH VS. ITO', (1991) 191 ITR 667 (SC), 'M.K.AGROTECH (P) LTD. VS ACIT', (2019) 412 ITR 351 (KAR), 'ACIT VS. SRI.SARASWATHI IRON FOUNDRY', (2006) 287 ITR 313 (KARN.), 'SMT.SAIRA BANU VS. ACIT IN ITA 228/2009 DATED 26.06.2015, 'PR.CIT VS. SAMWON PRECISION MOULD', (2018) 401 ITR 486 (DELHI), 'CIT VS. KEERTHI AGRO MILLS (P) LTD., SLP(C) NO.17441-42/2018, 'CIT VS. KEERTHI AGRO MILLS (P) LTD.', (2018) 405 ITR 192 (KER),**

**'GURDAS GARG VS. CIT', (2015) 63 TAXMANN.COM
289 (P & H), 'SRI.LAXMI SATYANARAYANA OIL
MILL VS. CIT', (2014) 367 ITR 200 (AP),
'SMT.HARSHILA CHORDIA VS. INCOME-TAX
OFFICER', (2008) 298 ITR 349 (RAJ), 'WALFORD
TRANSPORT (EASTERN INDIA) LTD. VS CIT',
(1999) 240 ITR 902 (GAU.), 'CIT VS. THE
SOLUTION', (2016) 382 ITR 337 (RAJ), 'ANUPAM
TELE SERVICES VS. ITO', (2014) 366 ITR 122
(GUJ), 'HONEY ENTERPRISES VS. CIT', (2016) 236
TAXMAN 519 (DEL), 'GIRIDHARILAL GOENKA VS.
CIT', (1986) 179 ITR 122 (CAL), 'R.C.GOEL VS.
CIT', (2013) 213 TAXMAN 305 (DEL), 'HOTEL
NAGAS PVT. LTD. VS. CIT', 2016-TIOL-1012-HC-
MAD-IT, 'KAMATH MARBLES VS. ITO', (2003) 260
ITR 470 (KER.), 'CIT VS. SMT.SHELLY PASSI IN
ITA 179/2012 DATED 06.10.2012 (P& H), 'CIT VS.
R.S.SURIYA', (2015) 232 TAXMAN 126 (MAD), 'CIT
VS. ARTHUR ANDERSEN & CO.', (2009) 318 ITR**

**229 (BOM), 'KALYANKUMAR RAY VS. CIT', (1991)
191 ITR 634 (SC), 'CIT VS. KHEMCHAND RAMDAS',
(1938) 6 ITR 414 (PRIVY COUNCIL).**

5. On the other hand, learned counsel for the revenue has submitted that Section 40A(3) provides for disallowance of cash expenditure incurred in excess of Rs.20,000/- and that the aforesaid provision cannot be made applicable only if the case of the assessee falls within the exceptions provided under Rule 6DD of the Income Tax Rules. It is further submitted that the assessee has failed to prove by any cogent evidence that it was covered by any exceptions provided under Section 40A(3) of the Act read with Rule 6DD of the Income Tax Rules. It is also submitted that no substantial question of law arises in this appeal and that the order of the Tribunal is based on meticulous appreciation of evidence and it is not open for this court in the exercise of its appellate jurisdiction to interfere with the findings of fact made by the authorities. In

support of the aforesaid submissions reliance has been placed on **'VIJAY KUMAR TALWAR vs. COMMISSIONER OF INCOME TAX', (2011) 330 ITR 0001.**

6. We have considered the submissions made by learned counsel and have perused the record. Before proceeding further, it is apposite to take note of Section 40A(3) of the Act and Rule 6DD of the Rules, which read as under:

40A(3) Where the assessee incurs any expenditure in respect of which 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, or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, exceeds ten thousand rupees, no deduction shall be allowed in respect of such expenditure.

Rule 6DD No disallowance under sub-

Section (3) of Section 40A shall be made no payment shall be deemed to be the profits and gains of business or profession under sub-Section (3A) of Section 40A 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 or use of electronic clearing system through a bank account or through such other electronic mode as prescribed under Rule 6ABBA, exceeds ten thousand rupees in the cases and circumstances specified hereunder namely:

- (a) where the payment is made to –*
 - (i) the Reserve Bank of India or any banking company as defined in Clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949).*
 - (ii) The State Bank of India or any subsidiary bank as defined in section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959).*
 - (iii) Any co-operative bank or land*

mortgage bank;

(iv) *Any primary agricultural credit society or any primary credit society as defined under Section 56 of the Banking Regulation Act, 1949 (10 of 1949)*

(v) *The Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956);*

(b) where the payment is made to the Government and under the rules framed by it, such payment is required to be made in legal tender;

(c) where the payment is made by –

(i) any letter of credit arrangements through a bank.

(ii) a mail or telegraphic transfer through a bank.

(iii) a book adjustment from any account in a bank to any other account in that or any other bank.

(iv) a bill of exchange made payable

only to a bank

(v) to (vii) 3[***]

Explanation.—For the purposes of this clause and clause (g), the term “bank” means any bank, banking company or society referred to in sub-clauses (i) to (iv) of clause (a) and includes any bank [not being a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949)], whether incorporated or not, which is established outside India;

(d) where the payment is made by way of adjustment against the amount of any liability incurred by the payee for any goods supplied or services rendered by the assessee to such payee;

(e) where the payment is made for the purchase of—

- (i) agricultural or forest produce; or*
- (ii) the produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming; or*
- (iii) fish or fish products; or*
- (iv) the products of horticulture or*

apiculture, to the cultivator, grower or producer of such articles, produce or products;

(f) where the payment is made for the purchase of the products manufactured or processed without the aid of power in a cottage industry, to the producer of such products;

(g) where the payment is 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;

(h) where any payment is made to an employee of the assessee or the heir of any such employee, on or in connection with the retirement, retrenchment, resignation, discharge or death of such employee, on account of gratuity, retrenchment compensation or similar terminal benefit and the aggregate of such sums payable to the employee or his heir does not exceed fifty

thousand rupees;

(i) where the payment is made by an assessee by way of salary to his employee after deducting the income-tax from salary in accordance with the provisions of section 192 of the Act, and when such employee—

(i) is temporarily posted for a continuous period of fifteen days or more in a place other than his normal place of duty or on a ship; and

(ii) does not maintain any account in any bank at such place or ship;

*(j) 4[***]*

(k) where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person;

(l) where the payment is made by an authorised dealer or a money changer against purchase of foreign currency or travellers cheques in the normal course of his business.

Explanation.—For the purposes of this

clause, the expressions "authorised dealer" or "money changer" means a person authorised as an authorised dealer or a money changer to deal in foreign currency or foreign exchange under any law for the time being in force.]

7. From perusal of the Circular dated 06.07.1998 issued by Finance Department, it is evident that object of incorporation of Section 40A(3) was to make a provision to counter evasion of tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the department as to the identity of the payee and the reasonableness of the payment. The Supreme Court dealt with the ambit and scope of Section 40A(3) read with Rule 6DD and held that Section 40A(3) only empowers the assessing officer to disallow the deduction claimed as expenditure in respect of payments is made in cash. It was further held that consideration of business expediency and other relevant factors are not

excluded and genuine and bonafide transactions are not taken out of the sweep of the Section and it is open for the assessee to furnish to the satisfaction of the assessing officer the circumstances under which the payment in the manner prescribed under Section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from requirement of payment by a crossed cheque or a crossed bank draft in the circumstances specified in the Rule. It was further held that from conjoint reading of Section 40A(3) and Rule 6DD, it is evident that they are intended to regulate the business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions.

8. In the aforesaid well settled legal principles, we may now examine whether the assessee in the facts of the case has complied with the aforesaid requirement

so as to enable him to claim exemption from provisions of Section 40A(3) of the Act. The Assessing Officer in the order dated 29.12.2008 inter alia has held as under.

Cash payment on account of land purchase:

It is noticed during the course of scrutiny assessment that the assessee has made payment in excess of Rs.20,000/- in contravention to the provision of Section 40A(3) of the Income-Tax Act 1961, while making payment towards purchase of land, during the year. The amount so paid is quantified at Rs.87,92,635/-. This aspect was discussed with the assessee's authorized representative. Who in his submission dated 18.12.2008 has filed the reason for the same as "Payments made at the place which was not served with any banking facilities."

9. Thus, from the perusal of the relevant extract of the order passed by the assessing officer, it is evident that the assessee's authorized representative in his written submission dated 18.12.2008 had disclosed the

reason for payment in cash on the ground that the payments were made at place which was not served with any banking facility. The assessing officer has found that the place at which the payment was made had banking facility and therefore, has held that the assessee failed to prove that it was covered in the exception clause as provided under Section 40A(3) read with Rule 6DD. The aforesaid finding has been affirmed by Commissioner of Income Tax (appeals) vide order dated 23.02.2011. The relevant extract reads as under:

Considering the various facts, I find that the appellant could not demonstrate with cogent evidences that there was business expediency or sufficient cause for such cash payments to various parties in the relevant assessment year. The explanation of the appellant that the transaction has taken place in Devenahalli Taluk which lacked the banking facilities in and around the place is not acceptable in the light of the fact that these transactions have taken place in the vicinity of Bangalore District, Devenahalli Taluk, which

had umpteen number of banks and branches. Further, the contention of the appellant that the recipients had insisted on cash payment is not acceptable. Though the parties were identifiable and cash payments were genuine, these payments were squarely hit by the provisions of Section 40A(3).

10. Thus, it is evident that the Commissioner of Income Tax (Appeals) have also found that the assessee has failed to prove the stand taken by him that the transaction took place at the place where there were no banking facilities. The aforesaid finding has been affirmed by the Income Tax Appellate Tribunal. Therefore, the contention of the appellant that it had taken a defence before the authorities that the parties were identifiable and the transactions were genuine cannot be accepted, as the aforesaid contention is being raised for the first time in this appeal, which even otherwise is contrary to the material on record, which has already been referred to supra. The aforesaid

findings are findings of fact and this court as a general rule would not interfere except in cases where the parties have ignored material evidence or have acted on no evidence, or have drawn wrong inference from proved facts by applying the law erroneously. The assessee has not been able to show that its case falls in any of the aforesaid categories. In view of preceding analysis, the substantial question of law framed by bench of this court vide order dated 10.07.2013 is answered in the negative and against the assessee.

In the result, we do not find any merit in this appeal. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**