
(2002) 03 P&H CK 0007

In the Punjab And Haryana At Chandigarh

Case No : ITC No. 3 of 2001 18 March 2002 A.Y. 1989-90 & Income-tax Case No. 3 of 2001

Commissioner of Income Tax

APPELLANT

Vs

Nikko Auto Ltd.

RESPONDENT

Date of Decision : 18-03-2002

Acts Referred:

Income Tax Act, 1961 — Section 143, 256, 40A

Citation : (2002) 175 CTR 154

Hon'ble Judges : N.K. Sud, J;Jawahar Lal Gupta, J

Bench : Full Bench

Advocate : R.P. Sawhney with M.S. Guglani, for the Revenue None, for the Assessee, for the Appellant;

Judgement

N.K. Sud, J.

The revenue has filed this petition u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), seeking a direction to the Income Tax Appellate Tribunal, Delhi Bench "C", New Delhi (hereinafter referred to as "the Tribunal"), to draw up a statement of the case and refer the following question of law for the opinion of this court :

"Whether, on the facts and circumstances of the case, the Hon'ble Tribunal was right in law in laying a general rule that as and when the payee asks for payment in cash, that by itself becomes an exceptional circumstance leading to exemption from the requirement of section 40A(3) of the Income Tax Act, 1961 ?"

2. The assessee-company carries on business of manufacture of automobile parts. It filed its return of income for the assessment year 1989-90 declaring a loss of Rs. 48.94 lakhs. The assessment u/s 143(3) of the Act was completed on 26-3-1991, at a loss of Rs. 41,23,126. At the time of assessment an amount of Rs. 5,59,000 was disallowed u/s 40A(3) of the Act on account of 13 cash payments to sister concern M/s Alpha Toyo Ltd. The assessee had taken the plea

that the amount had been paid in cash on each occasion at the insistence of the payee as it needed cash to make payments to sales-tax, excise and customs departments as well as for labour payments. M/s Alpha Toyo Ltd., duly confirmed that the payments had been made at their insistence. The identity of the said party, which is a regular Income Tax assessee also stood established. The Income Tax Officer however, rejected this explanation as not satisfactory on the ground that "Alpha Toyo Ltd., is a company under the same management. Both the companies are having their bank accounts in Faridabad and payments could have been made through bank drafts or crossed cheques. The total number of payments are 13 and this indicates that the default is not an isolated one.

On appeal by the assessee, the Commissioner (Appeals) deleted the disallowance by holding that in view of the facts stated above, the transactions clearly fell within the exceptions provided in clause (j) or rule 6DD of the Income Tax Rules, 1962 (hereinafter referred to as "the Rules"). The Commissioner (Appeals) placed reliance on the observations of their Lordships of the Supreme Court in *Attar Singh Gurmukh Singh v. ITO*, (1991) 191 ITR 667 (SC) . He also placed reliance on the decision of this court in *Commissioner of Income Tax Vs. Avtar Singh and Sons*, .

The revenue filed an appeal before the Tribunal which upheld the findings of the Commissioner (Appeals). Thereafter the revenue filed an application u/s 256(1) of the Act before the Tribunal requiring it to refer the aforesaid question of law for our opinion. The prayer was declined vide order dated 22-10-1999, on the ground that the matter stood concluded by the judgment of this court and as such no referable question of law arose out of the order of the Tribunal. Hence, the present petition.

3. We have heard Mr. R.P. Sawlhney, learned counsel for the revenue, and we agree with the Tribunal that the matter stands concluded by the decision of this court in *Avtar Singh & Sons*" case (supra). It is evident from the facts as already noticed above that there is no dispute about the identity of the payee M/s Alpha Toyo Ltd. The said concern is a regular Income Tax and sales-tax assessee and information about its sales-tax number as well as its Permanent Account Number had duly been furnished. The payments stand duly accounted for in the books of that concern and are fully verifiable. Thus neither the genuineness of the transactions nor the genuineness of the parties is in dispute.

4. Section 40A(3) was inserted by the Finance Act, 1968, and was made applicable to the payments made after 31-3-1969. The object of information of this provision was explained in para 76 of Circular No. 6P dated 6-7-1968, issued by the Central Board of Direct Taxes as under :

"76. Sub-section (3) of new section 40A makes a provision for the disallowance of expenditure incurred in business and professions for which payment is made in an amount exceeding Rs. 2,500, otherwise than by a crossed cheque drawn on a bank or a crossed bank draft. This provision will apply in respect of payments

made after a date to be notified by the government, being a date not later than 31-3-1969. This provision is designed to counter evasion of a 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 proviso to section 40A(3) confers powers on the Board to notify in the Income Tax Rules any exceptions to the aforesaid provision keeping in view the available banking facilities, business exigencies and other relevant factors. These exceptions have been set forth in rule 6DD of the Rules. Since all the exceptional circumstances cannot be visualised, a residuary exception has been provided in sub-clause (j). This sub-clause excludes from the purview of section 40A(3) such cases where the assessee establishes that the payment could not be made by a crossed cheque or a draft due to exceptional and unavoidable circumstances and also furnishes evidence to the genuineness of the payment and the identity of the payee.

5. What constitutes an exceptional and unavoidable circumstances ? This question became a subject-matter of controversy giving rise to protracted litigation. The courts have been consistent in their view that the exceptional circumstances are to be seen from the point of view of a businessman keeping in view the exigencies of business. Still further, the Central Board of Direct Taxes itself has issued a Circular No. 220, dated 31-5-1977 in (1977) 108 ITR 8) illustrating the circumstances in which residuary exceptions of rule 6DD(j) are attracted. One of the circumstances mentioned by the Board is that the seller is refusing to accept payment by way of crossed cheque or a draft. Para 4 of this circular provides that the requirement of rule 6DD(j) would stand satisfied if a letter is produced by an assessee in respect of each transaction falling within the categories mentioned in the said circular giving full particulars of his address, sales-tax registration number, if any, for the purpose of proper identification to enable the Income Tax Officer to satisfy himself about the genuineness of the transaction. It is, therefore, evident that section 40A(3) has been enacted to check the flow of black money and is basically directed towards the transactions, which cannot be cross-checked and cross-verified.

6. Thus, the only point for consideration is as to whether the insistence of a payee on payment in cash required by it for making payments to sales-tax, customs and excise departments and also to its labour, constituted an exceptional circumstances or not. The following observations of a Division Bench of this court in the case of Avtar Singh & Sons (supra) relied upon by the Commissioner (Appeals) do support the claim of the assessee :

"..... The important point to be emphasized here is that the identity of the party to whom payments were made is beyond question and nor is there any doubt with regard to the genuineness of the payments. There is also in addition, an affidavit from the Chief Accountant of the seller regarding these payments having been received in cash and duly accounted for in the seller's books of

accounts and what is more that these payments were received in cash as money was urgently needed by the seller's after banking hours and the receipt of it by crossed cheque or draft would have delayed payment and caused necessary hurdles in the proper conduct of the seller's business. These circumstances, seen in the context of the aspect of business expediency, which is one of the important relevant factors in dealing with such matters, cannot, but lead to the irresistible conclusion that the payments made by the assessee, in cash, to the seller clearly fell within the exception provided in clause (j) of rule 6DD.

7. In the *The Janambhumi Vs. Commissioner of Income Tax*, , the Gauhati High Court was dealing with almost an identical situation. In that case also, the payments had been made in cash by a firm to a sister concern. The identity of the payee and the genuineness of the payments were not doubted by the Income Tax Officer but he did not accept the exceptional circumstance pointed out by the assessee i.e., that there was urgency and necessity for cash payments and thus there were special circumstances as envisaged under rule 6DD(J). The disallowance was upheld upto the Tribunal. However, the High Court had accepted the explanation of the assessee and observed that while considering the exceptional circumstances, business exigencies, convenience and security should also be looked into. It was a case where neither the genuineness of the payments nor the identity of the parties was in dispute. Thus, the court observed that if the provisions of rule 6DD(j)(i) were insisted on, the payments would have to be made by depositing the money in the bank by issuing cheques to the payee and the payee would have to draw the amount from the bank. This would have been hazardous and cumbersome procedure. In the present case also, the assessing officer has not doubted the requirement of cash by the payee for making payments to various government departments and also to the labour. Thus insistence on payments by account payee cheque or account payee draft would have involved similar hazardous and cumbersome procedure. In fact, the Gauhati High Court has correctly pointed that the Board Circular dated 31-5-1977, itself indicates that the circumstances mentioned therein are not the only circumstances which can be said to be exceptional and unavoidable. There may be other exceptional and unavoidable circumstances which may not be put in writing. Thus while considering the exceptional circumstances, the facts and circumstances of each case have to be considered.

Thus, in our considered view, the case of the assessee is fully covered by the exceptions provided in section 40A(3) read with rule 6DD(J) and the Board circular. Therefore, no referable question of law arises out of the order of the Tribunal.

8. Before parting with, the case we would like to observe that the assessing officer had rejected the assessee's explanation merely on the ground that both the companies are sister concerns and have bank accounts at Faridabad. The assessee's explanation that the payments had been made at the insistence of the payee which required cash for making further payments to various

government departments as also to its labour has not been disputed. Merely because total number of payments was 13 or that the two parties were sister concerns would not in the circumstances of this case, be enough for rejecting the claim of the assessee.

In the result, we find no merit in this petition, which is accordingly dismissed.

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