

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'B' BENCH, KOLKATA**

**(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)**

**ITA No. 450/Kol/2018**  
Assessment Year: 2014-15

**Krishna Prasad Potnuri.....Appellant**  
**(Prop. Calcutta South Transport Co.)**  
**20, Phears Lance**  
**Bowbazar**  
**Kolkata - 700 012**  
**[PAN : AFQPP 3888 Q]**

**Income Tax Officer, Ward-40(1), Kolkata.....Respondent**

**Appearances by:**

*Shri Manish Tiwari, FCA, appeared on behalf of the assessee.*  
*Shri S.M. Das, Addl. CIT, D/R, appearing on behalf of the Revenue.*

Date of concluding the hearing : June 6<sup>th</sup>, 2018  
Date of pronouncing the order : August 3<sup>rd</sup>, 2018

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)-12, Kolkata (hereinafter the 'Ld. CIT(A)'), dt. 03/01/2018, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2014-15.

2. The assessee is an individual and is in the business of transportation. He is a proprietary concern under the name and style of M/s Calcutta South Transport Co. He filed his return of income on 26<sup>th</sup> September, 2014, declaring total income at Rs.12,77,840/-. The assessment was completed u/s 143(3) determining the income of at Rs.2,19,26,760/-, interalia making a disallowance u/s 40A(3) of the Act, for the reason that the assessee made cash payments for hiring trucks beyond the limits prescribed u/s 40A(3) of the Act.

Aggrieved the assessee carried the matter in appeal. Before the Id. First Appellate Authority, he contended that the payments were made due to business expediency and at the instance of the truck drivers and the transactions were genuine

and not doubted by the Assessing Officer. He relied on a number of case-law. The Id. CIT(A) rejected the contentions of the assessee and confirmed the order of the Assessing Officer.

3. Further aggrieved, the assessee is in appeal before us.

The Id. Counsel for the assessee repeated the contentions raised before the lower authorities on the issue of disallowance u/s 40A(3) of the Act. He submitted that the nature of business of the assessee requires hiring of trucks from the market and while making payments to the truck drivers, cross cheques are not accepted in many cases and the assessee is bound to pay in cash. He submitted that the Assessing Officer did not verify any of the expenditure nor he has doubted the same and has only made a technical disallowance. He filed a paper book which consists of a number of vouchers and cash statement and submitted that it is evident from the same that payments were made through agents and hence covered by Rule 6DD(k) of the Act. He relied on the decision of the Jaipur 'C' Bench of the Tribunal in the case of *M/s. A Daga Royal Arts, Jaipur vs. ITO, Ward-2(2), Jaipur* in ITA No. 1065/JP/2016, order dt. 15/05/2018 and other case-law which we would be dealing as and when necessary.

On Ground No. 2, which is against the disallowance of conveyance expenses, he submitted that the entire conveyance were disallowed, which is totally unfair and argued that this is an adhoc disallowance based on surmises and hence has to be deleted.

3.1. The Id. D/R, on the other hand, referred to page 2 of the assessment order and submitted that the assessee had admitted before the Assessing Officer that he was not aware of the provisions of Section 40A(3) of the Act and had voluntarily agreed for an addition of Rs.2,04,08,780/- and had also offered to pay advance tax. He vehemently contended that Section 40A(3) of the Act, is not regarding genuineness of payments. He pointed out to the list of payments and submitted that most of them were made in excess of Rs.35,000/- and the assessee has not demonstrated any exceptional circumstances which specifically fell under Rule 6DD(k). He submitted that business expediency has been taken care of by the Government by giving limit of Rs.35,000/-.

He also disputed the argument of the assessee that the payments were through a commission agent.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

The assessee is a transport contractor. During the course of scrutiny proceedings, he submitted the following submissions:-

*"My nature of business i.e. transportation business which exclusively transports goods from Kolkata to extreme parts of the southern part of India. All my truck run from Kolkata to extreme south covering almost 2500-3000 Kms. We have to pay transportation charges of Rs.50,000/- per truck to carry the goods. At most 80% of the agreed transportation is to be paid to the driver for the purpose of Diesel toll tax, drivers fooding and en-route expenses. Hence we have to pay the amount to carry on our business. Therefore I would like to state that my case falls under the exceptional circumstances category which does not fall under the provisions of section 40A(3) of the IT Act 1961. The limit of payments in cash as prescribed in the provisions of 40A(3) of the IT Act 1961 was introduced long time back when the diesel cost was very low compared to the today's market rate. If I follow the rules and the regulations laid down in the above said provision I shall not be able to carry on my business. The truck drivers does not accept cheques / drafts as he does not have any back accounts and he is on the road to transport goods."*

4.1. The Id. Counsel for the assessee submitted that the fact that the truck drivers, insist on cash payments for smooth supply of trucks, is not denied by the revenue. It is also not disputed that to ensure that at no point of time, the assessee is deprived of trucks, he was forced to pay in cash. The Assessing Officer in this case has not doubted the business expediency or genuineness of these transactions. We also find that the copies of the bills produced evidence that payments were made through agents. Under these circumstances, the propositions of law, discussed in the order of the Co-ordinate Bench of this Tribunal in the case of *DCIT vs. Maruti Freight Movers Ltd. in ITA No. 482/Kol/2014, order dt. 05/04/2017*, is reproduced as under:-

*"9. We have heard the rival submissions and perused the materials available on record including the paper book of the assessee. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The fact*

that assessee was forced to carry on its transportation activity through the assistance of agents is proved beyond doubt. Hence we hold that it does not make any difference whether the said agent through whom the business per se was carried on, was appointed by the assessee or by the truck owners association. The assessee had stated that out of the total consideration of hire charges paid by the assessee, a portion is also attributed towards the agency commission which is being recovered by the truck owners. Hence it could be concluded that the assessee indeed had paid commission to the agents and the same has been routed through payment made to truck owners towards truck hire charges.

9.1. We find that the similar issue had cropped up before the co-ordinate bench of Ahmedabad Tribunal in the case of [Chartered Logistics Ltd vs ACIT](#) in IT(SS) A No. 37 to 40/Ahd/ 2013 and IT (SS) A No 115 to 118/Ahd/ 2013 for the Asst Years 2007-08 to 2010-11 dated 15.11.2013. In the said case, it was held as below:-

"6. The learned AR of the assessee submitted before us that since in all the years the issue involved is identical, therefore, the same are argued together. He submitted that a search action under [section 132](#) was carried out in the assessee's case on 11.02.2010. The AO found that certain cash payments were made in excess of limit prescribed under [section 40A\(3\)](#), and hence, he made the impugned additions. He submitted that the assessee was engaged in the business of transportation, and has entered into contract with M/s. Hindustan Lever Ltd., Reliance, Kalpataru, etc. for transportation of goods. Copies of few such agreements are placed at page nos.77 to 102 of the paper book. He submitted that consequent to the aforesaid arrangement, such goods are transported through trucks owned by it as well as through hired trucks. It was submitted that as regard payments in respect of hiring charges of the trucks, the said payment was made in cash by the assessee to brokers who, in turn, was required to make payments to the concerned truck owner/drivers on behalf of the assessee. He submitted that the fact that the payments have been made by the assessee to brokers was not in dispute at all. He further submitted that the AO repeatedly mentioned in the show cause notices issued by him that the concerned payments have been made by assessee to its brokers. Copies of such show cause notice with respect to disallowance u/s.40A(3) for all the four years are placed at page nos.33 to 49 of the paper book. It was further argued that the assessee has also brought this fact to the notice of the AO as well as ld. CIT(A) that payments were made to brokers vide its written submissions, copies of which are placed at page no.11 to 26 of the paper book. In view of the above, it was contended that there was no violation of provisions of [section 40A\(3\)](#) r.w.s. Rule 6DD of the Income Tax Rules, since the cash payments have been made to brokers. Reliance was placed at page no.11 of the CIT(A)'s order and page no.1 of the paper book. It was further submitted that even the learned CIT(A) has recorded a finding that the assessee has not made payments to individual truck owners but to various brokers through whom the trucks are engaged. Reliance was placed at page no.12, para 6 of the learned CIT(A)'s order. It was further submitted that ultimate recipient of the payment viz. the drivers/owners of the truck have insisted for cash payments as they have to travel huge distance and cash was required for meeting with the expenditure and exigencies during the trips. For this, reliance was placed para 2.2. of the assessment order. It was further submitted that as per clause-,"k" of Rule 6DD of the IT Rules, no disallowance u/s.40A(3) can be made where cash payment was to be made to an agent who in turn was required to make cash payment on behalf of the assessee. It was submitted that as per Black's Law Dictionary, "broker" means an agent who acts

as on intermediary or negotiator, especially between prospective buyers and sellers. Therefore, it was submitted that it is established beyond doubt that the concerned payments were made by the assessee to its agents/brokers. When the payments were made to brokers and the fact that the ultimate recipient of the payment viz. the drivers/ owners of the trucks have demanded cash payments is not disputed, exception carved out as per Rule 6DD(k) clearly gets invoked and no disallowance u/s.40A(3) is called for and the same be deleted. He placed reliance on the decision of the ITAT, Ahmedabad bench in the case of Vijaykumar P. Desaid (Individual & HUF) - ITA No.46 to 57/Ahd/2013 and 85 to 96/Ahd/2013 consolidated order dated 29.8.2013, and also on the decision of the Hon<sup>ble</sup> Madras High Court in the case of CIT Vs. Sri Shanmuga Ginning Factory 37 taxmann.com 422 (Mad.). In the alternative, the learned AR submitted that the assessee has on one hand received freight from various companies, and on the other hand, it has passed on considerably portion of the same to its brokers for making payments in respect of hiring charges. The assessee retains only a small amount from the gross receipts received from the concerned companies, and the same ranges between 2.79% to 3.83% of such gross receipts. He placed reliance on page no.17 of the paper book. It was argued that merely for the sake of convenience, assessee recorded freight income received from the companies as well as the freight expenses paid through brokers. It is submitted that what the assessee earns as income is merely the freight difference and the same is in the nature of commission. When the assessee earns merely freight difference, the freight paid to the brokers is not its expenditure at all. Once the payments are not in the nature of expenditure, there is no question of disallowance of any expenditure invoking the provisions of [section 40A\(3\)](#). He placed reliance on the decision of the ITAT, in the case of G.A. Roadlines Vs. ITO, 44 SOT 145 (Hyd) and ITO Vs. Shri Ashish V. Patel, ITA No.676/ahd/2013 order dated 28.6.2013.

7. On the other hand, the learned DR argued and supported the order of the AO, and submitted that the payments were not made to the brokers, but to the parties.

8. We have heard rival submissions and perused the orders of the lower authorities and material available on record. In the instant case, the AO observed that the assessee has made cash payments for freight charges to brokers, which was in excess of the limit prescribed under [section 40A\(3\)](#) of the Act. He, therefore, by invoking the provisions of [section 40A\(3\)](#) of the Act, made disallowance of 10,69,899/- for A.Y.2007-2008, 7,05,198/- for A.Y.2008- 2009 6,92,47,389/- for A.Y.2009-2010 and for A.Y. 2010-2001 94,85,912/-. On appeal, the learned CIT(A) has confirmed the action of the AO, on the ground that the entire freight charges from customers have been included in the books of accounts of the assessee, as the turnover and freight payments have been made to the drivers are part of the business expenses, and therefore, the provisions of [section 40A\(3\)](#) are applicable to the assessee. The learned CIT(A) has also observed that the arguments of the assessee that the payments were made to truck drivers, who insisted for payment in cash was not exceptional case, because the assessee has not made payments to individual truck owners but to various brokers through whom the trucks were engaged, and therefore, the case of the assessee was not covered by the exceptions mentioned in Rule 6DD. The alternative arguments of the assessee that if the disallowance is made under [section 40A\(3\)](#), the GP will go abnormally high, was also not accepted by the learned CIT(A) on the ground that the disallowance under [section 40A\(3\)](#) of the Act was a technical disallowance for violation of specific provisions of [Income Tax Act](#). Before us, the learned AR of the assessee has relied on the decision of the Ahmedabad Bench of the

Tribunal in the case of Vijaykumar P. Desai (Individual & HUF) (supra), wherein the Tribunal has held as under:

"6. We find that on this aspect, it is noted by the learned CIT(A) that as per the remand report of the AO, the AO had issued notices u/s 133(6) of the Act to all eighteen persons whose names were available in the seized materials regarding cash payments exceeding Rs.20,000/- and all of them had confirmed that they were acting as agents on behalf of these two assessees for making purchases on their behalf and they were getting commission in the range of 0.75% to 1%, They had also confirmed that they were receiving cash payment from these two assessees and were in turn making cash payment to the raddiwalas from whom they were making purchases on behalf of these two assessees. These facts are noted by the learned CIT(A) from the remand report In the remand report, it was also reported by the AO that the AO had also issued notice u/s 131 of the Act to three such agents on random basis out of total eighteen agents and out of these three persons, two appeared before the AO and confirmed that they were acting as agent for these two assessees for making purchases on behalf of these two assessees. It was also confirmed by them that they were taking payment in cash from these two assessees and payment was made in cash to the suppliers of the goods. It was also confirmed that they were taking commission ranging from 0.5% to 0.75% on supply of waste papers to the assessee. In the light of these facts, it is seen that the provisions of clause (k) of Rule 6DD of the IT Rules are squarely applicable and hence, in the facts of the present case, no disallowance u/s 40A (3) of the Act is justified. Hence, on this aspect, we do not find any reason to interfere in the order of the learned CIT(A). Accordingly, we confirm his order on this aspect, we do not find any reason to interfere in the order of the learned CIT(A). Accordingly, we confirm his order on this aspect."

9. We find that in the instant case also, it is not in dispute that the payments were made by the assessee to the brokers from whom the trucks were hired on payment, and in turn was required to make the payment in cash to the truck- drivers in each. As per Oxford Dictionary & Thesaurus-II Page no.15, an agent is:

i) person acting for another in business etc.

ii) person or thing producing effect

iii) broker, delegate, envoy, executor, functionary, go-between, intermediary, mediator, middleman, negotiator, proxy, representative, surrogate, trustee.

Therefore, a broker is akin to an agent. Thus, the facts of the case are identical to the facts, which were in the case of Vijay kumar P. Desai (supra), and therefore, the decision in that case is squarely applicable to the facts of the assessee"s case. Hence, respectfully following the above-cited decision of the Tribunal, we set aside the orders of the lower authorities, and delete the disallowance under [section 40A\(3\)](#) of the Act, and this ground of the appeal of the assessee is allowed.

9.2. We find that the Hon"ble Jurisdictional High Court in the case of [Goenka Agencies vs CIT](#) reported in (2003) 263 ITR 145 (Cal) wherein the head notes are reproduced as below:-

"Business expenditure-Disallowance under [s. 40A\(3\)](#)-Exceptional and unavoidable circumstances-Assessee has to establish only one of the requirements as provided in r. 6DD(j)(1) and (2), namely, that the payment was made in exceptional and unavoidable circumstances or the payment by cheque or bank draft was not practicable or would have caused genuine difficulty-Assessee made cash payments to its supplier on the insistence of the latter-Genuineness of the transaction was not doubted by the AO or by the Tribunal-Identity of the payee was also not questioned-

*CIT(A) found that the payments were made to keep harmonious relationship with the principal-Same clearly satisfies the requirement of the provisions of r. 6DD(j)(1)-Disallowance under [s. 40A\(3\)](#) not justified."*

9.3. We find that the Hon<sup>ble</sup> Gujarat High Court in the case of [Anupam Tele Services vs ITO](#) reported in (2014) 366 ITR 122 (Guj) wherein the head notes are reproduced as below:-

*Business Expenditure-Disallowance-Validity of-Cash payment exceeding prescribed limit-Assessee acted as agent of Tata for distributing mobile cards and recharge vouchers-Assessee made payments by account payee cheques till August 2005-Subsequently TATA issued circular and assessee was required to make payment by cash, since it had bank account with cooperative bank-Assessee made payment in cash on different dates and such payment exceeded Rs. 20,000 each-AO disallowed payment made in cash invoking provisions of s 40A(3)-CIT(A) deleted disallowance made by AO holding that genuineness of transaction was not disputed and assessee took a very practical step in making payment in cash to stay in business in a competitive environment-Tribunal allowed revenue's appeal relying on clause (j) of r 6DD-Held, s 40A (3) aims to curb and reduce possibilities of back money transactions-It does not eliminate considerations of business expediences-Assessee was compelled to make cash payments under peculiar circumstances as principal company, to which assessee was a distributor, insisted that cheque payment from a cooperative bank would not do, since the realization takes a longer time-If assessee had not made cash payment, it would have received the recharge vouchers delayed by 4/5 days and thereby would severely affect its business operations- Rigors of s 40A(3) to be lifted-Further the exceptions contained in r 6DDD are not exhaustive and that rule must be interpreted liberally- Impugned order set aside-Assessee's appeal allowed.*

9.4. We also find that the Hon<sup>ble</sup> Gauhati High Court in the case of [Walford Transport \(Eastern India\) Ltd vs CIT](#) reported in (1999) 240 ITR 902 (Gau) wherein the head notes are reproduced as below:-

*Business expenditure-Disallowances under [s. 40A\(3\)](#)-Exceptional and unavoidable circumstances-Assessee explained that its financial positions was very bad at the relevant time and it had to resort to cash transaction in order to avoid the risk of bouncing of cheques- Explanation accepted by AO in majority of transaction-Same however not accepted in some transactions only on the basis that the names of payees were not indicated in the vouchers-On appeal, CIT(A)- Where the transaction is found to be genuine and the identity of payee is established a liberal view of compelling and mitigation circumstances should be taken-The Tribunal, erred in drawing the inference that in no circumstances deferred payment would be covered by r. 6DD(j)-CIT(A) was justified in allowing deduction of cash payments.*

*In the said judgement it was also held as under:-*

*"13. Learned Counsel appearing for the Revenue has submitted that the payments have not been genuine, on the basis of the finding of assessing authority where it was has observed that on some of the vouchers the names of the payees were not indicated. As indicated earlier, this finding of fact has been upset by the CIT(A) on checking each voucher and it was observed that the names of the payees were indicate. From a perusal of the decisions of different High Courts referred to above, it clearly emerges that the purpose of [s. 40A\(3\)](#) of the Act is not to penalize the assessee for making cash payment of an amount of Rs.2,500 or above. The purpose is only preventive and to check evasion of tax and flow of unaccounted money or to check*

transactions which are not genuine and may be put as camouflage to evade tax by showing fictitious or false transactions."

9.5. We also find that the Hon'ble Rajasthan High court in the case of [Smt Harshila Chordia vs ITO](#) reported in (2008) 298 ITR 349 (Guj) had held that the exceptions contained in Rule 6DD of the Rules are not exhaustive and that the said rule must be interpreted liberally.

9.6. In view of our aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the subject mentioned cash payments would fall under the ambit of exception provided in Rule 6DD(k) of the Rules in the facts and circumstances of the case and accordingly the provisions of [section 40A\(3\)](#) of the Act could not be made applicable in the instant case. Hence we do not find any infirmity in the order of the ld CIT(A) in this regard. Accordingly, the grounds raised by the revenue are dismissed. "

The Jaipur Bench of the Tribunal in the case of *M/s. A Daga Royal Arts (supra)*, discussed the entire law on Section 40A(3) of the Act, and held as follows:-

"20. In case of [Attar Singh Gurmukh Singh v. ITO](#) (supra), the matter which came up for consideration before the Hon'ble Supreme Court, the facts of the case were that assessee had made payment in cash exceeding a sum of Rs. 2,500/- for purchase of certain stock-in-trade. Payments were not allowed as deductions in the computation of income under the head "profits and gains of business or professions" as the same were held to be in contravention of [section 40A\(3\)](#) read with that 6DD of the Income rules. In that factual background, the question regarding validity of [section 40A\(3\)](#) and applicability of the said provisions to payment made for acquiring stock-in- trade came up for consideration before the Hon'ble Supreme Court.

21. The Hon'ble Supreme Court referring to the provisions of [section 40A\(3\)](#) and Rule 6DD and in particular, Rule 6DD(j), as existed at relevant point in time, has held as under:-

"6. As to the validity of [section 40A\(3\)](#), it was urged that if the price of the purchased material is not allowed to be adjusted against the sale price of the material sold for want of proof of payment by a crossed cheque or crossed bank draft, then the income-tax levied will not be on the income but it will be on an assumed income. It is said that the provision authorizing levy tax on an assumed income would be a restriction on the right to carry on the business, besides being arbitrary.

7. In our opinion, there is little merit in this contention. [Section 40A\(3\)](#) must not be read in isolation or to the exclusion of rule 6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading activities. [Section 40A\(3\)](#) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources. The terms of [section 40A\(3\)](#) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in [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 the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of [section 40A\(3\)](#) and rule 6DD 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. - [Mudiam Oil Co. v. ITO](#) [1973] 92 ITR 519 (AP). If the payment is made by a crossed cheque on a bank or a crossed bank draft, then it

will be easier to ascertain, when deduction is claimed, whether the payment was genuine and whether it was out of the income from disclosed sources. In interpreting a taxing statute the Court cannot be oblivious of the proliferation of black-money which is under circulation in our country. Any restraint intended to curb the chances and opportunities to use or create black-money should not be regarded as curtailing the freedom of trade or business."

22. Further, the Hon'ble Supreme Court upheld the applicability of [section 40A\(3\)](#) to payment made for acquiring stock-in-trade and raw materials and also affirmed the decision of Hon'ble Rajasthan High Court in case of [Fakri Automobiles v. CIT](#) [1986] 160 ITR 504 (Raj) to the effect that the payments made for purchasing stock-in-trade or raw material should also be regarded as expenditure for the purposes of [section 40A\(3\)](#) of the Act.

23. The Hon'ble Supreme Court has therefore upheld the constitutional validity of [section 40A\(3\)](#) of the Act and has held that the provisions are not intended to restrict the business activities and restraint so provided are only intended to curb the chances and opportunities to use or create black money and the same should not be regarded as curtailing the freedom of trade or business. The Hon'ble Supreme Court has thus laid great emphasis on the intention behind introduction of these provisions and it would therefore be relevant to examine whether in the present case, there is any violation of such intention and if ultimately, it is determined that such intention has been violated, then certainly, the assessee deserves the disallowance of the expenditure so claimed.

24. The Hon'ble Supreme Court referring to the provisions of [section 40A\(3\)](#) as existed at relevant point in time which talks about considerations of business expediency and other relevant factors and Rule 6DD(j) which provides for the exceptional or unavoidable circumstances and the fact that the payment in the manner aforesaid was not practical or would have caused genuine difficulty to the payee and furnishing the necessary evidence to the satisfaction of the Assessing Officer as to the genuineness of the payments and the identity of the payee has held that:

"The terms of [section 40A\(3\)](#) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in [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 the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule."

25. Here, it is relevant to note that there has been no change in the provisions of [section 40A\(3\)](#) in so far as considerations of business expediency and other relevant factors are concerned, as existed at relevant point in time and as considered by the Hon'ble Supreme Court and the provisions of [section 40A\(3\)](#) as exist now and relevant for the impugned assessment year i.e. AY 2013-14. However, Rule 6DD(j) has been amended and by notification dated 10.10.2008, it now provides for an exception only in a scenario where the payment was required to be made on a day on which banks were closed either on account of holiday or strike. A question which arises for consideration is whether the legal proposition so laid down by the Hon'ble Supreme Court regarding consideration of business expediency and other relevant factors has been diluted by way of delegated legislation in form of Income Tax Rules when the parent legislation in form of [section 40A\(3\)](#) to which such delegated legislation is subservient has been retained in its entirety. Alternatively, can it be said that what has been prescribed as exceptional circumstances in Rule 6DD as amended are exhaustive enough and which visualizes all kinds and nature of business expediency in all possible situations.

26. If we look at the legislative history of [section 40A\(3\)](#) and Rule 6DD, we find that initially, [section 40A\(3\)](#) provides for disallowance of 100% of the expenditure unless the matter falls under exception as provided in Rule 6DD(j) Later on, [section 40A\(3\)](#) has been amended to provide for disallowance of 20% of the expenditure incurred in cash and Rule 6DD(j) was omitted. Thereafter, by virtue of another amendment, disallowance under [section 40A\(3\)](#) was increased from 20% to 100%, however, Rule 6DD(j) was not reintroduced in original form to provide for exceptional and unavoidable circumstances rather it was restricted to payment by way of salary to employees and

thereafter, by virtue of latest amendment in year 2008 to payments made on a day on which the banks were closed on account of holiday or strike.

27. We do not believe that by virtue of these amendments, the legal proposition so laid down by the Hon'ble Supreme court regarding consideration of business expediency and other relevant factors has been diluted in any way. At the same time, we also believe that Rule 6DD as amended are not exhaustive enough and which visualizes all kinds and nature of business expediency in all possible situations and it is for the appropriate authority to examine and provide for a mechanism as originally envisaged which provides for exceptional or unavoidable circumstances to the satisfaction of the Assessing officer whereby genuine business expenditure should not suffer disallowance.

28. Further, the Courts have held from time to time that the Rules must be interpreted in a manner so as to advance and not to frustrate the object of the legislature. The intention of the legislature is manifestly clear and which is to curb the chances and opportunities to use or create black money and to ascertain whether the payment was genuine or whether it was out of the income from disclosed sources. And [Section 40A\(3\)](#) continues to provide that no disallowance shall be made in such cases and under such circumstances as may be prescribed having regard to the nature and extent of the banking facilities available, consideration of business expediency and other relevant factors. In our view, given that there has been no change in the provisions of [section 40A\(3\)](#) in so far as consideration of business expediency and other relevant factors are concerned, the same continues to be relevant factors which needs to be considered and taken into account while determining the exceptions to the disallowance as contemplated under [section 40A\(3\)](#) of the Act so long as the intention of the legislature is not violated. We find that our said view find resonance in decisions of various authorities, which we have discussed below and thus seems fortified by the said decisions.

29. We refer to the decision of the Hon'ble Rajasthan High Court in case of [Smt. Harshila Chordia vs. ITO](#) (supra), where the facts of case were that the assessee had made certain cash payments towards purchase of scooter/mopeds which exceeded Rs. 10,000/- in each case to the principal agent instead of making payment through the cross cheques or bank draft. The Assessing Officer invoked the provisions of [section 40A\(3\)](#) and held that they were no exceptional circumstances falling under rule 6DD which could avoid consequences of the provisions of [section 40A\(3\)](#) of the Act. The Id. CIT(A) held that such exceptional circumstances did exist. However, the findings of the Id. CIT(A) were reversed by the Tribunal and the matter came up for consideration before the Hon'ble High Court.

30. The Hon'ble High Court observed that the principal reason which weighed with the Tribunal in discarding the explanation furnished by the assessee was that the case of the assessee did not fall in any of the clauses enumerated in the circular issued by the CBDT about the explanatory note appended to clause (j) was to operate as it was existing at the relevant time and enumerated circumstances in the circular was exhaustive of exceptional circumstances. The Hon'ble High Court observed that the Tribunal has erroneously assumed that enumeration of instances in the circular in which the provisions of clause (j) under rule 6DD would operate to be exhaustive of such circumstances and had not been properly understood its implication. It was further observed by the Hon'ble High Court that primary object of enacting [section 40A\(3\)](#) in its original incarnation was two-fold, firstly, putting a check on trading transactions with a mind to evade the liability to tax on income earned out such transaction and, secondly, to inculcate the banking habits amongst the business community. The consequence which was provided was to disallow of deduction of such payments/expenses which were not through bank either by crossed cheques or by demand draft or by pay order. It was further held by the Hon'ble High Court that:

".....Apparently, this provision was directly related to curb the evasion of tax and inculcating the banking habits. Therefore, the consequences, which were to befall on account of non-observation of sub-section (3) of [section 40A](#) must have nexus to the failure of such object. Therefore the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration which has been overlooked by the Tribunal.

31. It was accordingly held by the Hon'ble High Court that it is the relevant consideration for the assessing authority under the [Income Tax Act](#) that before invoking the provisions of [section 40A\(3\)](#)

in light of Rule 6DD as clarified by circular of the CBDT that whether the failure on the part of the assessee in adhering to requirement of provisions of [section 40A\(3\)](#) has any such nexus which defeats the object of provision so as to invite such a consequence. This is particularly so, because the consequence provided u/s 40A(3) for failure to make payments through bank is not absolute in terms nor automatic but exceptions have been provided and leverage has been left for little flexing by making a general provision in the form of clause (j) in rule 6DD. Thereafter, the Hon'ble High Court refers to the clause 6DD(j) and the circular dated 31st May, 1977 issued by the Board in the context of what shall constitute exceptional and unavoidable circumstances within the meaning of section Clause (j). The Hon'ble High Court observed that the circular in paragraph 5 gives a clear indication that rule 6DD(j) has to be liberally construed and ordinarily where the genuineness of the transaction and the payment and the identity of the receiver is established, the requirement of rule 6DD(j) must be deemed to have been satisfied. The Hon'ble High Court observed that apparently [section 40A\(3\)](#) was intended to penalize the tax evader and not the honest transactions and that is why after framing of rule 6DD(j), the Board stepped in by issuing the aforesaid circular and this clarification, in our opinion, is in conformity with the principle enunciated by the Supreme Court in CTO vs. Swastik Roadways reported in [2004] 2 RC 539; [2004] 3 SCC 640.

32. The legal proposition that arises from the above decision of the Hon'ble Rajasthan High Court is that the consequences, which were to befall on account of non-observation of sub-section (3) of [section 40A](#) must have nexus to the failure of such object. Therefore the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration and which should be examined before invoking the rigours of [section 40A\(3\)](#) of the Act.

33. In case of [Anupam Tele Services v. Income Tax Officer](#), the matter which came up for consideration before the Hon'ble Gujarat High Court, the facts of the case were that the assessee who is involved in the business of distribution mobile and recharge vouchers of Tata Tele Services Ltd had made payment of Rs. 33,10,194/- to Tata Tele Services Ltd., by cash on different dates. The assessee had made such payment through account payee cheques till 22nd Aug, 2005, when a circular was issued by Tata Tele Services Ltd., requiring the appellant to deposit cash at the company's office at Surat. In that factual background, the Hon'ble High Court held as under:-

"17. Rule 6DD of the IT Rules, 1962 provides for situations under which disallowance under [s. 40A\(3\)](#) shall not be made and no payment shall be deemed to be the profits and gains of business or profession under the said section. Amongst the various clauses, cl. (j) which is relevant, read as under:

(j) where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike;

18. It could be appreciated that [s. 40A](#) and in particular sub-cl. (3) thereof aims at curbing the possibility of on-money transactions by insisting that all payments where expenditure in excess of a certain sum (in the present case twenty thousand rupees) must be made by way of account payee cheque drawn on a bank or account payee bank draft.

19. As held by the Apex Court in case of Attar Singh Gurmukh Singh (supra). "...In our opinion, there is little merit in this contention. Sec. 40A(3) must not be read in isolation or to the exclusion of r. 6DD. The section must be read along with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading activities. Sec. 40A(3) only empowers the A.O. to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources, The terms of [s. 40A\(3\)](#) are not absolute. Considerations of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the A.O. the circumstances under which the payment in the manner prescribed in [s. 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 the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of [s. 40A\(3\)](#) and r. 6DD that they are

intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions:"

20. It was because of these considerations that this Court in case of Hynoup Foods (P.) Ltd. (supra) observed that the genuineness of the payment and the identify of the payee are the first and foremost requirements to invoke the exceptions carved out in r. 6DD(j) of the IT Rules,1962.

21. In the present case, neither the genuineness of the payment nor the identity of the payee were in any case doubted. These were the conclusions on facts drawn by the CIT(A). The Tribunal also did not disturb such facts but relied solely on r. 6dd(j) of the rules to hold that since the case of the assessee did not fall under the said exclusion clause nor was covered under any of the clauses of r. 6DD, consequences envisaged in [s. 40A\(3\)](#) of the Act must follow.

22. In our opinion, the Tribunal committed an error in coming to such a conclusion. We would base our conclusions on the following reasons:

(a) The paramount consideration of [section 40A\(3\)](#) is to curb and reduce the possibilities of black money transactions. As held by the Supreme Court in Attar Singh Gurmukh Singh (supra), [section 40A\(3\)](#) of the Act does not eliminate considerations of business expediencies.

(b) In the present case, the appellant assessee was compelled to make cash payments on account of peculiar situation. Such situation was as follow-

(i) the principal company, to which the assessee was a distributor, insisted that cheque payment from a co-operative bank would not do, since the realization takes a longer time;

(ii) the assessee was, therefore, required to make cash payments only;

(iii) Tata Tele Services Ltd. assured the assessee that such amount shall be deposited in their bank account on behalf of the assessee;

(iv) It is not disputed that the Tata Tele Services Ltd. did not act on such promise;

(v) if the assessee had not made cash payment and relied on cheque payments alone, it would have received the recharge vouchers delayed by 4/5 days and thereby severely affecting its business operations.

We would find that the payments between the assessee and the Tata Tele Services Ltd. were genuine. The Tata Tele Services Ltd. had insisted that such payments be made in cash, which Tata Tele Services Ltd. in turn assured and deposited the amount in a bank account. In the facts of the present case, rigors of [s. 40A\(3\)](#) of the Act must be lifted.

23. We notice that the Division Bench of the Rajasthan High Court in case of [Smt. Harshila Chordia vs. ITO](#) (2007) 208 CTR (Raj) had observed that the exceptions contained in r. 6DD are not exhaustive and that the said rule must be interpreted liberally."

34. In case of [M/s Ajmer Food Products Pvt. Ltd., Ajmer vs. JCIT](#) (supra), a similar issue has come up before the Co-ordinate Bench and speaking through one of us, it was held as under:

"4.5 The genuineness of the transaction as well as the identity of the payee are not disputed. Further, the appellant has explained the business expediency of making the cash payments to both the parties which has not been controverted by the Revenue. Following the decision of Gujarat High Court in case of Anupam Tele Services (supra) and Rajasthan High Court in case of Harshila Chordia (supra), the addition of Rs. 45,738/- under [section 40A\(3\)](#) is deleted."

35. In case of Gurdas Garg vs. CIT(A), Bathinda (supra), the matter which came up for consideration before the Hon'ble Punjab & Haryana High Court, the facts of the case are pari materia to the instant case and the ratio of the said decision clearly applies in the instant case. In that case, the facts of the case were that the assessee was engaged in trading in properties and during the course of assessment proceedings, the AO observed that there are transactions where the payments have been made in excess of Rs. 20,000/- in cash which were disallowed u/s 40A(3) of the Act. The Hon'ble High Court held that rule 6DD(j) is not exhaustive of the circumstances in which the proviso to [section 40A\(3\)](#) is applicable and it only illustrative. The Hon'ble High Court refers to the decision of the Hon'ble Rajasthan High Court in case of [Smt. Harshila Chordia v. ITO](#) (Supra) and the decision of Hon'ble Supreme Court in case of [Attar Singh Gurmukh Singh v. ITO](#) (Supra). The High Court further observed that the Id. CIT(A) has given a finding that the identity of the payee i.e. vendors in respect of land purchase by the appellant was established, the sale deeds were produced, the genuineness thereof was accepted and the amount paid in respect of each of these agreement was satisfied before the Stamp Registration Authority and the transactions were

held to be genuine and the bar against the grant of deductions u/s 40A(3) of the Act was not attracted. The Hon'ble High Court further observed that the Tribunal did not upset these findings including as to the genuineness and the correctness of the transactions and it is also important to note that the Tribunal noted the contention on behalf of the appellant that there was a boom in the real estate market and therefore it was necessary, therefore, to conclude the transactions at the earliest and not to postpone them; that the appellant did not know the vendors and obviously therefore, insisted for payment in cash and that as a result thereof, payments had to be made immediately to settle the deals. The Tribunal did not doubt this case. The Tribunal, however, held that the claim for deduction was not sustainable. In view of [Section 40A\(3\)](#) as the payments which were over Rs. 20,000/- were made in cash. The Hon'ble High Court accordingly observed that "the Tribunal has not disbelieved the transactions or the genuineness thereof nor has it disbelieved the fact that payments having been made. More importantly, the reasons furnished by the appellant for having made the cash payments, which we have already adverted to, have not been disbelieved. In our view, assuming these reasons to be correct, they clearly make out a case of business expediency."

36. The Co-ordinate Bench in case of *M/s Dhuri Wine vs DCIT (ITA No. 1155/chd/2013 & others dated 09.10.2015)* has held that the proposition so laid down by the Hon'ble High Court in case of *Gurdas Garg (supra)* is quite unambiguous to the effect that even if the case of the assessee does not fall in any of the clauses of Rule 6DD of the Income Tax Rules, invoking the provisions of [section 40A\(3\)](#) of the Act can be dispensed with if the assessee is able to prove the business expediency because of which it has to make the cash payments, the genuineness of the transactions have also to be verified.

37. The Co-ordinate Bench in case of [Rakesh Kumar vs. ACIT \(ITA No. 102\(Asr\)/2014 dated 09.03.2016\)](#) relying on the decision of Hon'ble Punjab and Haryana High Court in case of *Gurdas Garg (supra)* has held that the genuineness of the payment has not been doubted as the Assessing Officer himself has held that sale deeds of properties were registered with the Revenue department of the Government. Therefore, following the decision of Hon'ble Punjab and Haryana High Court, the payment for purchase of land was allowed.

38. We further note that in case of *M/s ACE India Abodes limited (DB Appeal No. 45/2012 dated 11.09.2017)*, a similar issue has come up before the Hon'ble Rajasthan High Court regarding payment for purchase of land from various agriculturist for which the assessee has paid consideration in cash and shown the land as its stock-in-trade. The Hon'ble Rajasthan High Court referring to the intent behind introduction of [section 40A\(3\)](#) and catena of decisions right from *Attar Singh Gurmukh Singh, Smt. Harshila Chordia, Gurdas Garg, Anupam Tele Services* referred *supra* has decided the issue in favour of the assessee and against the department.

39. The issue which is being disputed before us has to be considered and decided in light of facts on record and the legal position which emerges from the above referred decisions. The facts of the case are that during the year under consideration, the assessee firm has purchased 26 pieces of plot of land in the month of April and May, 2012 from various persons for a total consideration of Rs. 2,46,28,425/-, out of which payment amounting to Rs. 1,71,67,000/- were made in cash to various persons, payment amounting to Rs. 59,48,920/- were made in cheque to various persons, and Rs. 8,15,700/- and Rs. 6,84,296/- were paid in cash towards stamp duty and court fee respectively. During the course of assessment proceedings, the assessee submitted copies of the sale deed, the particulars of which find mention on page 7 and 8 of the assessment order. On perusal of the said details, it is observed that the said details contains the name of the seller, date of sale deed, plot no., purchase value, stamp duty, Court fee and mode of payment - cash/cheque. Therefore, as far as the identity of the persons from whom the purchases have been made and genuineness of the transactions of purchase of various plots of land and payment in cash is concerned, the same is evidenced by the registered sale deeds and there is no dispute which has been raised by the Revenue either during the assessment proceedings or before us. The identity of the sellers and genuineness of the transactions is therefore fully established in the instant case.

40. From perusal of the assessment order, it is further noted that the AO, on perusal of the details of the properties purchased, as per copies of the sale deed furnished, held that the assessee had made cash payments regularly and no specific circumstances have been brought to his knowledge that

*the cash payments were made due to some unavoidable circumstances. It was held by the AO that maximum cash payments were made to persons residing in Jaipur city and in single family, repeated cash payments were made which itself shows that there were no unavoidable circumstances to make cash payments to the sellers. What is therefore relevant to note that the AO has appreciated the necessity of determining the unavoidable circumstances which could have led the assessee to make cash payments. During the course of assessment proceedings, it was submitted by the assessee that the payment for purchase of land has been made in cash because the sellers were new to the assessee and refused to accept the cash. It was submitted that the delay in making the cash payment, it could have lost the land deals. In this regard, the Id AR submitted before us that the assessee had purchased the lands both through cash and cheques. Based on the requirement of the seller, assessee had selected the mode of payment. For the sellers, who had insisted the payments in cash, assessee had withdrawn the cash from bank on the same date of registry and made the payments to seller accordingly. The withdrawals from bank and payments to seller have been tabulated below as per dates below:-*

*41. It was submitted by the Id AR that in order to secure the deal, assessee had no other option but to make the payment in cash. Cash payments were made from the disclosed sources being the amount withdrawn from bank. It was for sheer insistence of the seller that the payments were made in cash. Had the assessee denied the cash payment looking to the provisions of [sections 40A\(3\)](#), the deal could not have been finalized. In such circumstances, in the business interest and to complete the deal, the assessee had chosen to make the payments in cash fortified through registered sale deed. The payment has been made out of the explained sources, through the registered document and as a disclosed transaction.*

*42. We find force in the contentions so raised by the Id AR. The transactions have been executed by the assessee within a span of one and half month and there are transactions where the payment has been made through cheque and there are transactions where the payment has been made through cash. The said contentions are supported by the fact that on the same day, there are cash and cheque payments as evidenced from the details of the transactions appearing at page 7 and 8 of the assessment order. It is therefore clear that the assessee was having sufficient bank balance and only at the insistence of the specific sellers, the assessee has withdrawn cash and made payment to them and wherever, the seller has insisted on cheque payments, the payment has been made by cheque. This makes out a case that the assessee has business expediency under which it has to make payment in cash and in absence of which, the transactions could not be completed. The second proviso to [section 40A\(3\)](#) refers to "the nature and extent of banking facility, consideration of business expediency and other relevant factors" which means that the object of the legislature is not to make disallowance of cash payments which have to be compulsory made by the assessee on account of business expediency. Further, the source of cash payments is clearly identifiable in form of the withdrawals from the assessee's bank accounts and the said details were submitted before the lower authorities and have not been disputed by them. It is not the case of the Revenue either that unaccounted or undisclosed income of the assessee has been utilised in making the cash payments.*

*43. In the entirety of facts and circumstances of the case and respectfully following the legal proposition laid down by the various Courts and Coordinate Benches referred supra, we are of the view that the identity of the persons from whom the various plots of land have been purchased and source of cash payments as withdrawals from the assessee's bank account has been established. The genuineness of the transaction has been established as evidenced by the registered sale deeds and lastly, the test of business expediency has been met in the instant case. Further, as held by the Hon'ble Rajasthan High Court in case of Harshila Chordia (supra), the consequences, which were to befall on account of non-observation of sub-section (3) of [section 40A](#) must have nexus to the failure of such object. Therefore the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration. The intent and the purpose for which [section 40A\(3\)](#) has been brought on the statute books has been clearly satisfied in the instant case. Therefore, being a case of genuine business transaction, no disallowance is called for by invoking the provisions of [section 40A\(3\)](#) of the Act. "*

5. Applying the propositions of law laid down in the above referred case, to the facts of the case on hand, we hold that the disallowance in question made u/s 40A(3) is bad in law. Hence we delete the same

6. On the issue of disallowance of conveyance allowance the Id. Assessing Officer has erroneously held that conveyance allowance is same as "Travelling Allowance". Both these expenditures are different. In any event, as there are no vouchers produced, we restrict the disallowance to 25% of the expenditure claimed. The balance 75% is allowed. Hence this ground of the assessee is allowed in part.

7. In the result, appeal of the assessee is allowed in part

***Kolkata, the 3<sup>rd</sup> day of August, 2018.***

Sd/-  
**[S.S. Godara]**  
 Judicial Member

Sd/-  
**[J. Sudhakar Reddy]**  
 Accountant Member

Dated : 03.08.2018  
 {SC SPS}

*Copy of the order forwarded to:*

**1. Krishna Prasad Potnuri**  
**(Prop. Calcutta South Transport Co.)**  
**20, Phears Lance**  
**Bowbazar**  
**Kolkata - 700 012**

**2. Income Tax Officer, Ward-40(1), Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
 By order

Senior Private Secretary  
 Head of Office/ D.D.O. ITAT, Kolkata Benches

