IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITR Nos. 7 and 8 of 1996

Judgment reserved on: 12.1.2007

Date of decision: January 2, 2008

ITR No. 7 of 1996

Commissioner of Income Tax ..Applicant

Versus

M/s Dalip Chand and sons ..Respondents

For the Applicant: Mr. Vinay Kuthiala, Advocate

For the Respondents: Mr. Dushyant Dadwal, Advocate

ITR No. 8 of 1996

M/s Dalip Chand and sons ..Applicants

Versus

Commissioner of Income Tax ..Respondent

For the Applicants: Mr. Dushyant Dadwal, Advocate

For the Respondents: Mr. Vinay Kuthiala, Advocate

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V .K.Ahuja, Judge.

Whether approved for reporting?[1]

<u>Per Deepak Gupta, J.</u>

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

The following identical question of law has been sent for the opinion of this court in the aforesaid reference petitions:-

> "Whether on the facts and in the circumstances of the case and on a proper interpretation of rule 6 DD of the Income Tax Rules, 1962, read with the Central Board of Director Taxes Circular No. 200 dated May 31, 1977 (see (1977) 108 I.T.R. (St) 8, the Tribunal was justified in upholding the disallowance of Rs. 3,08,503/- in terms of sub-section (3) of section 40A of the Income Tax Act, 1961?"

The brief facts are that the assessee firm is based at Shamshi, District Kullu, H.P. It used to purchase goods from certain outside parties, mainly from Chandigarh, Damtal and Palampur. The assessee made payments of more than Rs. 10,000/- in a day to the parties. These payments were made in cash. The Assessing Officer disallowed payments of Rs. 3,57,239/- on the ground that they had been made in cash whereas they should have been made by means of crossed cheque or draft.

The assessee filed an appeal and the CIT (Appeals) accepted a few contentions of the assessee

and gave relief of Rs. 48,786/- to it. However, addition of Rs. 3,08,503/- to the income was confirmed.

The assessee went up in appeal. The case of the assessee was that the parties from whom it was making purchases insisted that they be paid in cash. The only evidence led in this behalf was the statement of one Virender Sood of M/s Naresh Kumar and Bros., Palampur. Another ground raised by the assessee was that it had made separate payments of less than Rs.10,000/-, in a day, though the total payments in a day to one party exceeded Rs. 10,000/-. The Tribunal came to the conclusion that there was a deliberate attempt on the part of the assessee to split up the payment so as to bring the transaction below Rs. 10,000/-.

The Tribunal finally rejected the case of the assessee. Thereafter the assessee moved the Tribunal for making reference and the aforesaid question has been referred for our opinion.

We have heard Mr. Dushyant Dadwal, learned counsel for the assessee and Mr. Vinay Kuthiala, learned counsel for the Revenue.

The main argument of the assessee is that the payments were of less than Rs. 10,000/-, but the

Revenue wrongly clubbed the payments made in one day and came to the conclusion that more than Rs. 10,000/- have been paid. It has also been urged by the learned counsel for the applicant that since the assessee and the persons from whom it had taken supplies did not have bank accounts at Shamshi and Bhuntar, the assessee must be given benefit of Board's Circular No. 20, dated 31.5.1977.

Relevant portion of Section 40A (3) of the Income Tax Act at the relevant time read as follows:-

> "(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, such expenditure shall not be allowed as a deduction by the Finance Act, 1995, w.e.f. 1.4.1996."

Reliance has also been placed on Circular No. 220 which lays down certain exceptions to the aforesaid Rules and permits an assessee to make payments of Rs. 10,000/- or more in the event of exceptional or

unavoidable circumstances or when genuine difficulties are faced by the assessee.

Mr. Dushyant Dadwal, Advocate, has relied upon a judgment of Orissa High Court in **Commissioner of Income Tax, Orissa Vs. Aloo Supply Co. (1980) 121 ITR 680** wherein the Orissa High Court held that statutory limit under Section 40A(3) of the Act applies to payments made to a party at one time and not to the aggregate of the payments made to a party in the course of the day as recorded in cash book. We are not in agreement with this proposition of law. Otherwise it would be very easy for any assessee to split up the payments of more than the sum permitted in two or three different payments during the same day. However, if the assessee can show to the Income Tax Authorities what were the special circumstances which necessitated the payment being made separately two or three times, then there can be a ground to accept his explanation. This will, however, depend upon the facts and circumstances of each case.

The Apex Court in **M/s Attar Singh Gurmukh Singh, etc. Vs. Income Tax Officer, Ludhiana, etc. AIR 1991 SC 2109** while dealing the question as to whether Section 40A is valid or not held as follows:-

"Section 40A(3) must not be read in isolation or of the exclusion of R.6DD. The section must be read alongwith 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. S. 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 S. 40A(3) are not absolute. Consideration of business expendiency and other relevant factors are not excluded. The genuine and bonafide 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 of 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 S. 40A(3) and R.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. If the payment is made by a crossed cheque drawn 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."

A perusal of the judgment of the Apex Court makes it clear that the Apex Court upheld the validity of Section 40A(3) of the Act in view of the exceptions provided for in the Circular. The Supreme Court held that if payments were made normally by crossed cheque or bank draft, then it would be easy to ascertain whether the deduction claimed is genuine or not. The court further held that the statute had been enacted to prevent the proliferation of black money in the country. In the present case the officers have dealt with each and every contention of the assessee. The Income Tax Officer has dealt with the entire circular 6DD and has come to the

conclusion that the case of the assessee is not covered under any of the exceptions laid down in this circular.

The only explanation given by the assessee was that the purchasers and the assessee did not have bank accounts at Bhuntar/Shamshi and that the persons from whom the assessee had purchased the goods insisted on cash payments. The Assessing Officer found that no stock register was maintained and the assessee had allegedly purchased goods from Chandigarh, Damtal and Palampur. Wherever expenditure for purchase of stocks was more than Rs.10,000/- invariably in the same cash book and ledger, the assessee had shown two or more separate entries of the same day so that no entry exceeded Rs. 10,000/-. The Assessing Officer came to the conclusion that this was done deliberately by the assessee to avoid the rigours of the Act.

Interestingly, according to the assessee he had purchased the stocks on credit and the dealers came personally to collect the payments. If the goods had been purchased earlier, then the assessee knew very well what was the total amount to be paid by him to the dealer. Therefore, there was no question of making two separate payments in a single day. If the dealer was coming from

outside to collect the money in respect of transaction which had already taken place the explanation of the assessee that he did not know that he had to pay two separate sums cannot be accepted.

The Assessing Officer has also found that many other dealers in Bhuntar, Shamshi, Kullu who were purchasing goods from same persons from whom the assessee had purchased goods made payments by crossed drafts to the said stockist. As such the story of the assessee that he was asked by the stockists to pay in cash cannot be accepted. In fact the authorities below have come to the conclusion that the assessee is telling lies.

Reliance placed by the learned counsel for the applicant on **Ramaditya Investments Vs. Commissioner of Income Tax (2003) 262 ITR 491** is totally misconceived. In that case the payments made in cash were the payments made by the assessee acting as a commission agent where he was required to pay cash. It was in these circumstances that the court held that the case of the assessee was covered under Clause V of the Circular.

In **Goenka Agencies Vs. Commissioner of Income Tax (2003) 263 ITR 145** the Calcutta High Court accepted the case of the assessee and permitted deductions of the payments made in excess of the prescribed amount because it came to the conclusion that the payment was not disputed and was genune. In that case the total transaction was for Rs. 2,00,000,00/-. Except for a sum of Rs. 4,83,000/- the balance amount of Rs. 1,95,170,00/- was paid by cash. It was in these circumstances that the Calcutta High Court held that the finding of the Tribunal was perverse and set aside the same. The Calcutta High Court in fact held that if the identity of the transaction is found to be not genuine, then the fact whether payment is made under unavoidable circumstances or due to exceptional circumstances become secondary. In the present case various authorities have come to the conclusion that the transactions themselves are extremely doubtful and appear to be fraudulent. In these circumstances the petitioner is not entitled to the benefit of Circular.

The finding as to whether the assessee was entitled to any of the benefits on the factual basis is a finding of fact which cannot be interfered with by us in

reference proceedings. The only legal question as to whether two or more payments can be split up in a single day has been answered by us by holding that normally this cannot be done and it is for the assessee to show that when he made the first payment he was not aware that second payment was to be made.

In view of the above discussion, the reference question is answered in favour of the Revenue and against the assessee. A copy of this judgment under the signature of Registrar General of this Court be forwarded to the Tribunal.

(Deepak Gupta), J.

January 2, 2008(K) (V. K. Ahuja), J.