

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No.1065/JP/2016
निर्धारण वर्ष / Assessment Year : 2013-14

M/s A Daga Royal Arts, Jaipur	बनाम Vs.	ITO, Ward-2(2), Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAJFA6768J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajeev Sogani (C.A)
राजस्व की ओर से / Revenue by : Shri J. C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 16/04/2018
उदघोषणा की तारीख / Date of Pronouncement: 15/05/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-1, Jaipur dated 28.10.2016 for Assessment Year 2013-14 wherein the assessee has taken the following ground of appeal:-

"In the facts and circumstances of the case and in law, the Id. CIT(A) has grossly erred in confirming the action of Id. AO in disallowing the claim of expenditure of Rs. 1,71,67,000/- by applying section 40A(3) of Income Tax Act, 1961. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please may be granted by deleting the entire addition Rs. 1,71,67,000/- imposed under section 40A(3)."

2. 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.

3. During the course of assessment proceedings, a show-cause notice was issued to the assessee as to why the purchases made in cash should not be disallowed u/s 40A(3) of the Act. In its submission filed vide letter dated 24.02.2016, the assessee submitted that it has purchased the plots of land in the month of April and May, 2012 as capital asset but later on, the same have been converted into stock-in-trade and the reflection and presentation in the annual accounts has been made accordingly. It was further submitted 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 support, reliance was placed on the CBDT Circular No. 220 (F No. 206/17/76-IT (A-11)) dated 31.05.1977. Further, the assessee referred to the intention behind introduction of the provisions of section 40A(3) which is to check evasion of tax so that the payment is made from the disclosed source. Further reliance was placed on the various decisions including the decisions of Hon'ble Rajasthan High Court in case of CIT v. Mahendra & Co. Ltd, (1987) 163 ITR 316 (Raj), Badrilal Phool Chand Rodawat v. CIT (1987) 167 ITR 404 (Raj), Kanti Lal Purshottam & Co. vs. CIT (1985) 155 ITR 519 (Raj.) and CIT vs. Banswara Fabrics Ltd (2004) 267 ITR 398 (Raj.).

4. The submissions so filed by the assessee were considered but were not found acceptable to the Assessing Officer. The Assessing Officer observed that in all these cases which have been relied upon by the assessee, the emphasis was given on the fact that the seller has pressed to make cash payment and the identity of the seller is genuine. The AO, on perusal of the details of the properties purchased, as per copies of the sale deed furnished during the course of assessment proceedings, noticed that the assessee had made cash

payments regularly, no specific circumstances have been brought to his knowledge that the cash payments were made due to some unavoidable circumstances.

5. The Assessing Officer further referred to the nature of business disclosed in the audit report as well as the fact that the assessee has sold plots of land amounting to Rs. 82 lacs during the year under consideration and held that the assessee is in the business of real estate and has purchased the subject properties for business purposes and the same were stock-in-trade and not investment as contended by the assessee.

6. Further, the AO referred to the Rule 6DD of the Income Tax Rules and stated that the case of the assessee does not fall in any of the sub-clauses of Rule 6DD. Regarding the Circular No. 220 (F No. 206/17/76-IT(A-11) dated 31.05.1977 relied upon by the assessee, it was observed by the AO that the said circular is very old and no reliance can be placed on the said circular.

7. The AO further held that the word 'expenditure' has not been defined in the Act. It is a word of wide importance. Section 40A(3) refers to expenditure incurred by the assessee in respect of which payment is made. It means all outgoings are brought under the word 'expenditure' for the purpose of the section. The expenditure for purchasing the stock-in-trade is one of such outgoings. The value of the stock-in-trade has to be taken into account while determining the gross profits u/s 28 on principles of commercial accounting. It was accordingly held by the AO that the payment made for purchase of stock-in-trade would be covered by the term "expenditure" and which would be subject matter of disallowance u/s 40A(3) of the Act.

8. It was further observed by the AO that the maximum purchases were made from the persons who are residing in Jaipur city and there are banking facilities in the city. It was further observed by the AO that in single family, repeated cash payments were made which shows that there were no unavoidable circumstances to make cash payment to the sellers and the AO

accordingly made disallowance of Rs. 1,71,67,000/- in respect of purchase of property in cash invoking the provisions of section 40A(3) of the Act. However no disallowance was made in respect of cash payment for stamp duties and court fees paid by the assessee.

9. Being aggrieved, the assessee carried the matter in appeal before Id. CIT(A). It was contended before the Id. CIT(A) that the pieces of land were purchased as investment in the month of April, May 2012 with an intention to hold these for longer period as investments. However, on the basis of the lucrative market and repetitive enquiries about the various plots of land in which it had invested, the assessee decided to convert the said plots of land into its stock-in-trade in the month of June 2012. The assessee further submitted that whether a particular asset is held as 'capital asset' or 'stock-in-trade' is a matter of intention of the assessee, which is known only to the assessee and the intention is best reflected through the entries passed in the books of accounts. At the time of purchase, the entries passed in the books of accounts of accounts reflected these transactions as investments.

10. It was further submitted that in the real estate business, businessman does not transfer the purchased property/land in his own name as registration charges and stamp duty on transfer is required to be paid which makes it a costly affair. Alternatively, they obtain Power of Attorney from the seller and pay advance on the basis of 'Agreement to Sell' and after identification of the customer, the registry is being done in the name of final buyer/customer only, through the valid Power of Attorney. Whereas in the instant case under consideration, all the lands were transferred in the name of assessee firm through registered sale deeds and it incurred a sum of Rs. 14,99,996/- towards registration charges and stamp duty thereon, which support the assessee's intention of holding the purchased lands for longer term as investments.

11. It was further submitted that cash payments for the purpose of acquiring capital asset, being investments, are not covered by the provisions of section 40A(3) of Act. Regarding AO's observation that the auditors have mentioned that the assessee is engaged in the real estate business, it was submitted that the auditors have rightly mentioned their real estate business and nothing adverse could have been inferred by the AO because the investments in land were converted into stock-in-trade on 1st June, 2012 by passing appropriate entries in books of accounts and during assessment proceedings, this factual aspect was also conveyed. Further, there was a real estate business turnover to the tune of Rs. 82,00,000/- and accordingly the audit report contained this factual aspect. It was submitted that the same can have no adverse effect on the fact of cash being paid for acquiring investment in the form of land.

12. It was further submitted that even if the purchases are treated as stock-in-trade, section 40A(3) does not in blanket manner mandate disallowance in respect of all situations where cash payment has been made. It was submitted that the cash payments were made on the specific condition put up by the seller and they being resident of Jaipur or belonging to the same family does not make any difference. In this regard, it was further submitted that CBDT Circular No. 220(F No. 206/17/76-IT (A-II) dated 31.05.1977 was brought to the notice of the AO and which was binding on the AO and his action of ignoring the said circular is illegal.

13. It was further submitted that the lands were purchased through registered sale deeds, identity of the sellers and genuineness of the transactions is fully established and the AO has not raised any doubt over the genuineness of the payments and it was accordingly submitted that where the genuineness of the payments which are as per the registered sale deeds are not doubted by the AO, no disallowance could be made. In support, reliance was placed on the decision of Hon'ble Punjab and Haryana High Court in case of Gurdas Garg vs. CIT [2015] 63 taxmann.com 289.

14. The Id AR further placed reliance on the decision of Hon'ble Supreme Court in case of Attar Singh Gurmukh Singh vs. ITO 59 taxmann.com 11, the decision of Hon'ble Rajasthan High Court in case of Harshila Chordia vs. ITO 298 ITR 349, and decision of Hon'ble Gujarat High Court in Anupam Tele Services (2014) 362 ITR 92 (Guj), besides various other decisions.

15. The submissions and the contentions so made by the assessee were considered but were not found acceptable to the Id. CIT(A) and his findings are contained at paras 5 to 12 which we deem it appropriate to reproduce as under:-

“(v) I have duly considered the submissions of the appellant, assessment order and the material placed on record. The first contention of the appellant was that it has made investment in the 26 plots purchased by it in the months of April-May, 2012 and these were converted into stock in trade on 01.06.2012 by passing the journal entries in its books of accounts. It is noted from column no. 28 of the tax audit report relating to quantitative details of principal items of traded goods for the year under consideration that opening stock of land was shown at 2270.71 square yards, which was valued at Rs. 49,25,295/- in its profit and loss account. Further, in Column no. 8(a) of tax audit report, the auditor has mentioned the nature of business as manufacturing & trading of furniture, handicrafts, iron scrap and real estates and generation of wind power and in column no. 8(b), which is related to change in the nature of business during the year, it has been stated by the auditor that the assessee has undertaken the business of manufacturing of ballot boxes. Therefore, it is evident from these facts that the contention of the appellant that it made investments in 26 plots in the months of April-May 2012 do not match with its financial statements and tax audit report, which reveal that the appellant was engaged in the real estate business at least from the financial year 2011-12 preceding to the assessment year under consideration. Thus, this

contention of the appellant deserves to be rejected and it is held that the AO was justified in treating the purchase of 26 plots as stock in trade and not as investment, as claimed by the appellant.

(vi) I have also examined the alternate contention of the appellant that the sellers of the plots insisted for cash payments and due to business exigencies, it made the cash payments in violation of provisions of section 40A(3) of the Act and these payments were genuine and the AO has also not raised any doubt about the genuineness of these payments and thus the provisions of section 40A(3) of the Act are not applicable. It would be relevant to reproduced the provisions of section 40A(3) of the Act as under:-

“(3) Where the assessee incurs any expenditure in respect of which 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, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

(3A) Where.....exceeds twenty thousand rupees:

Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under subsection (3) and this sub-section 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, exceeds twenty thousand rupees, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors :

(vii) It may be mentioned here that Rule 6DD provides relief to the assessee from the rigour of section 40A(3) in the circumstances prescribed therein and

thus Rule 6DD has taken into account, the circumstances having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors.

(viiia) The relevant extract of Rule 6DD is reproduced as under:

"6DD. No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business of 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, exceeds twenty thousand rupees in the cases and circumstances specified therein, namely:"

(viii) It is evident from the above that the Rule 6DD has specified the circumstances in which payments exceeding the prescribed limits can be made in cash. It was the contention of the appellant that the payments were made in cash out of business expediency to safeguard its interest. It may be mentioned that it was the stand of the appellant that it purchased 26 plots as investment and now it is taking plea that due to business exigencies, it had to make cash payments which are contradictory to each other. The appellant has relied upon a number of judicial pronouncements, wherein it was held that the terms of section 40A(3) are not absolute, consideration 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 appellant 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.

(ix) It may be mentioned here that Rule 6DD provides relief to the assessee from the rigour of section 40A(3) in the circumstances prescribed therein and thus Rule 6DD has taken into account, the circumstances having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors. However, in the instant case under consideration, the appellant was not able to specify under which clause of Rule 6DD its case falls. It may be mentioned that the Rule 6DD has been amended by the Income Tax (7th Amendment Rules), 2008 w.e.f. AY 2009-10 and the most of the judicial pronouncements relied upon by the appellant pertained to pre amended Rule 6DD. Hence, these are distinguishable and are of no help to the appellant company.

(x) The appellant relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg vs. CIT (supra), wherein it was held that where the genuineness of payments is not disbelieved, the disallowance u/s 40A(3) cannot be made and the decision of Hon'ble ITAT, Amritsar Branch, Amritsar in ITA no 102(Asr)/2014 for A Y 2010-11 wherein Hon'ble ITAT, has held that disallowance u/s 40A(3) for cash payments cannot be made if genuineness is not doubted. It may be mentioned that in the case of Gurdas Garg Vs CIT (Supra), the appeal for the AY 2009-10 was before the Hon'ble Court, however the said decision was pronounced on the basis of pre amended Rule 6DD.

In view of the above, the decision of Gurdas Garg Vs CIT (Supra) is of no help to the appellant.

(xi) However, it may be mentioned that in the case of DCIT vs. A. Ramamurthy (2016) 46 CCH 0323 (Chen Trib), vide its order dated 18.03.2016, the Hon'ble ITAT held as under:

"We have heard both the parties and perused the material on record. The main plea of the assessee is that the payments were made in cash

otherwise than cheque or demand draft in view of commercial expediency as well as insisted by the recipients. However, there is no material on record to show that those recipients have no bank account, banking facility is not available. Being so, in our opinion, the assessee has not shown any reasonable cause for making such payments in cash otherwise than by crossed cheque or demand draft."

(xii) It is to be noted that in the instant case under consideration, the appellant has not brought on record any reasonable cause for making cash payments in violation of provisions of section 40A(3) of the Act and also not been able to specify under which clause of amended Rule 6DD its case falls to bring it out from the rigours of provisions of section 40A(3) of the Act. It was stated by the appellant that the sellers insisted on cash payment but no evidence has been brought on record to substantiate the claim and it has also failed to brought on record that if it did not made the cash payments, the sellers would cancel the deals. It is important to mention here that the sellers were residents of Jaipur and most of them belonged to the same family and more than 50% of the payments were accepted by them through cheques. Thus, in the absence of any documentary evidence, the contention of the appellant that the sellers insisted on cash payments deserves to be rejected."

16. Now, the assessee is in appeal before us against the aforesaid findings of the Id CIT(A). The Id AR took us through the findings of the AO and the Id CIT(A) and reiterated the submissions made before the lower authorities. Further, the Id AR raised various contentions which find mention in the written submissions and which we deem it appropriate to reproduce as under:

"3.1 The submissions made before Id. CIT(A) appearing at CIT(A) order Pages 8 -14 may please be considered in correct perspective.

3.2 Ld. CIT(A) at page 18 of his order has rejected the appellants contention that said 26 plots purchased, in April, 2012, were part of investment. For this

he referred to Tax Audit Report as well as Audited Financial Statement. It is submitted that the firm while in real estate business can purchase certain real estate for business purpose and can also purchase certain real estate for investment purpose. This aspect is also accepted by CBDT in its circular dated 31/05/1977 as per which there is no restriction under the law for a trader of a particular item like jewellery, diamond, real estate or share to hold the same as investment also. Further, the assessee firm before lower authorities have submitted that it had paid the registration charges and stamp duties of Rs. 14,99,996 for getting the land registered in its name, which is not a general practice of a real estate businessman. This fact was not controverted by Id. lower authorities.

3.3 Ld. CIT(A) also erred in holding that the contention of the assessee that the lands were purchased as investments and the alternate plea that due to business exigencies, payment was made in cash is contradictory to each other. In this regard it is submitted that the assessee firm is a business entity which aims at maximizing its profits. Therefore, even while purchasing investments, business exigencies are kept in mind. Otherwise also it is submitted that the assessee firm, without agreeing, has taken an alternate plea that if, it is not considered that the lands were purchased as investments and were subsequently converted into stock-in-trade, then, business expediency should be considered.

3.4 It is submitted that the Id. AO or Id. CIT(A), has not raised any doubt about the genuineness of the transaction and, therefore, there is no dispute regarding the identity of the payee and genuineness of the transactions. The only objection raised is that there is violation of provisions of section 40A(3).

3.5 To appreciate the facts in a better manner let us look into the history of section 40A(3). It was introduced by the Finance Act, 1968 w.e.f 1-4-1968.

The object of insertion was explained by Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh v. ITO 59 taxmann.com 11 as under:

"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."

3.6 In view of above it will be apt to state that the provisions of section 40A(3) have been enacted as one of the measures for countering evasion of tax. The provisions were enacted to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources. Genuine and bona fide transactions are taken out of the sweep of Section 40A(3).

3.7 In the present case the assessee firm has not made use of black money for purchase of land in cash. It was just on the insistence of the sellers, cash was withdrawn from bank and the payment was made in cash keeping in mind the business exigencies. This fact is clear from perusal of working table submitted and appearing at CIT(A) order (Page 12) and from Bank Statements of the assessee firm.

3.8 Just after introduction of section 40A(3), certain exceptions were allowed to be provided by way of delegated legislations. Accordingly, Rule 6DD was notified in the year 1969 setting out the exceptions.

3.9 Attention is drawn towards the decisions of Hon'ble Jurisdictional Rajasthan High Court in the case of Harshila Chordia vs. ITO 298 ITR 349 wherein it was held that list of exceptions provided under rule 6DD is not exhaustive. Meaning thereby that more could be read into it, if the same does not violate the reason for which section 40A(3) was introduced. Thus, the

contention of Id. CIT(A) that the appellant was unable to specify under which clause of Rule 6DD its case fall is baseless.

After introduction of Rule 6DD, in the year 1970, vide IT (Fourth Amdt.) Rules, 1970, clause (j) to Rule 6DD was introduced which provided as under.

"Rule 6DD:

(j) in any other case where the assessee satisfies the Income-tax Officer that the payment could not be made by way of a crossed cheque drawn on a bank or by a crossed bank draft—

a. due to exceptional or unavoidable circumstances; or

b. because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof,"

3.11 Thereafter, CBDT issued Circular No. 220 dated 31.05.1977 providing an illustrative list of exceptional cases wherein cash payment could not attract disallowance u/s 40A(3) by virtue of Rule 6DD(j).

3.12 The above Rule 6DD(j) was omitted w.e.f. 25.07.1995 vide IT(Fourteenth Amdt.) Rules, 1995. Thereafter, Rule 6DD was amended many a times.

3.13 The above series of events and related amendments is tabulated as under:

Particulars	W.e.f
Introduction of section 40A(3)	1.4.1968
Introduction of Rule 6DD	1.4.1969
Insertion of Rule 6DD(j) <i>In any other case, where the assessee satisfies the Assessing Officer that the payment could not be made by a crossed</i>	1.4.1970

<p><i>cheque drawn on a bank or by a crossed bank draft-</i></p> <p><i>(1) due to exceptional or unavoidable circumstances, or</i></p> <p><i>(2) because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regard to the nature of the transaction and the necessity for expeditious settlement thereof;</i></p> <p><i>and also furnishes evidence to the satisfaction of the Assessing Officer as to the genuineness of the payment and the identity of the payee.</i></p>	
<p><i>CBDT Circular No. 220: Circumstances when ITO can relax requirement of making payment in excess of Rs. 2,500 by crossed cheques under clause (j) of rule 6DD</i></p>	<p>31.05.1977</p>
<p><i>Omission of Rule 6DD(j)</i></p>	<p>27.7.1995</p>
<p><i>Reintroduction of Rule 6DD(j)</i></p> <p><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 Income-tax Act, 1961, and when such employee-</i></p> <p><i>(A) 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</i></p> <p><i>(B) does not maintain any account in any bank at such place or ship</i></p>	<p>1.12.1995</p>
<p><i>Substitution of Rule 6DD(j) by notification dated 10.10.2008 where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike</i></p>	<p>1.4.2008</p>

3.14 Ld. CIT(A) while passing the order misread the provisions of rule 6DD by stating that the amended Rule with effect from A.Y. 2009-10 has deleted the considerations of exceptional and unavoidable circumstances and, therefore, the judicial pronouncements relied upon by the assessee firm pertain to pre-amended period and are of no help to the assessee firm. It is submitted that the considerations of exceptional and unavoidable circumstances in Rule 6DD was deleted w.e.f. 25.07.1995 only and, hence, the case laws relied upon by the assessee firm pertain to post amendment period only as all the cases have dealt with the post amendment assessment years.

3.15 Attention is again drawn towards the judgment of Hon'ble Punjab and Haryana High Court pronounced on 16th July, 2015 pertaining to the assessment year 2009-10 in the case of Gurdas Garg v. CIT(A), Bathinda [2015] 63 taxmann.com 289, in this case reference of CBDT circular no. 220 dated 31.05.1977, was made. This CBDT circular was introduced with reference to rule 6DD(j). Even after 25.07.1995, when rule 6DD(j) providing for exceptional circumstances was dropped, the reference by Hon'ble High Court denotes its relevance which is reproduced below for ready reference. Needless to mention that assessee case is covered in clause (d) of Para 4 of the said CBDT circular.

"...7. The respondent/assessee's case is supported by several judgments. The Rajasthan High Court in Smt. Harshila Chordia v. ITO [2008] 298 ITR 349 held as under:—

"14. About this clause, many doubts were raised and enquiries were directed to the Board as to what shall constitute exceptional and unavoidable circumstances within the meaning of Clause (j). That led to issuance of Circular by the Board on May 31, 1977 ([1977] 108 ITR (St.) 8), which is published in Taxmann, Vol. 1, 1988 Edition. Significantly paragraph 4 of the aforesaid Circular shows very clearly that all the circumstances in which the conditions laid down in Rule 6DD(j) could be applicable cannot be spelt out.

However, some of them which will seem to meet the requirements of the said rule are as follows:

- a. the purchaser is new to the seller; or*
- b. the transactions are made at a place whether either the purchaser or the seller does not have a bank account; or*
- c. the transactions and payments are made on a bank holiday; or*
- d. the seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller ; or*
- e. the seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchase the goods; or*
- f. specific discount is given by the seller for payment to be made by way of cash.*

15. It was further clarified in paragraph 6 that the above circumstances are not exhaustive but illustrative.

16. Therefore, in our opinion, the Tribunal was clearly in error in not travelling beyond the circumstances referred to in paragraph 4 of the Circular and to consider the explanation submitted by the assessee on its own merit..”

3.16 Ld. CIT(A) misdirected himself in distinguishing the case of Gurdas Garg (*supra*) with that of the assessee firm by holding that the judgment shall not apply for the period after A.Y. 2009-10. It is submitted that in the said judgment Hon'ble Punjab High Court relates to A.Y. 2009-10 i.e. way after the substitution of 6DD(j) in 1995. The court has simply mentioned the fact of amendment which has been brought in A.Y. 2009-10 and, therefore, the position prior to amendment in A.Y. 2009-10 is clear that even after 1995, the considerations of exceptional and unavoidable circumstances has to be taken into account before invoking the provisions of section 40A(3).

3.17 It is further submitted that the Department has not gone for revision petition or for SLP against the judgment of Hon'ble Punjab & Haryana High Court and in such a situation the case law is a binding precedence.

3.18 Attention is drawn towards the following cases wherein judgment of Hon'ble Punjab High Court in the case of Gurdas Garg (*supra*) has been still followed:

S.No	A.Y.	Case law	Court	Date of Order
1	2010-11	Dhuri Wine (2016) 48 ITR (Trib) 289	ITAT, Chandigarh Bench	09.10.2015
2	2010-11	Rakesh Kumar (2016) 46 CCH 270	ITAT, Amritsar Bench	09.03.2016

3.18.i Hon'ble ITAT, Chandigarh Bench, in the case of Dhuri Wine (2016) 48 ITR (Trib) 289 (Chandigarh), pertaining to the AY 2010-11, pronounced on 09.10.2015, held as under:

"...The proposition laid down by the Hon'ble High Court 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 have to make the cash payments, the genuineness of the transactions have also to be verified...."

"...The learned CIT (Appeals) while adjudicating the contention of the assessee with regard to the genuineness himself has held that it is not sufficient for the assessee to establish that the payments were genuine and the parties were identifiable. He was of the view that the assessee is further required to prove that due to exceptional and unavoidable circumstances as provided under the Rules, the payments were made in cash. Therefore, it is not a case of the

Department that the payments so made in cash were not genuine. The reasons given by the assessee at every stage have not been disbelieved. Since these reasons are correct, they really make out a case of business expediency. In this view, respectfully following the judgment of the Hon'ble Punjab & Haryana High Court in the case of Gurdas Garg (supra), we hold that the payments cannot be disallowed under section 40A(3) of the Act”[CLC 24-15]

3.18.ii Hon'ble ITAT, Amritsar Bench in the case of Rakesh Kumar (2016) 46 CCH 270, pertaining to the AY 2010-11, pronounced on 09.03.2016 has held as under:

"...In the present case, the genuineness of payment has not been doubted as Assessing Officer himself has held that sale deeds of properties were registered with the Revenue Department of Govt. Therefore, the case of the assessee is fully covered by the above decision of Hon'ble Punjab and Haryana High Court. Therefore, respectfully following the same we allow the ground of appeal filed by assessee...."

3.19 The assessee firm's case is squarely covered in its favour by the following judgment of Hon'ble Courts, which relate to post amendment period and has held that where the cash payment in made, keeping in mind the exceptional and unavoidable circumstances, no disallowance u/s 40A(3) can be made.

A.Y.	Case Law	Court	Date of Order
2005-06	Anupam Tele Services (2014) 362 ITR 92 (Guj)	High Court of Gujarat	04.02.2014
2011-12	M/s Ajmer Food Products Pvt. Ltd. Vs. JCIT, Range-2, Ajmer [ITA No. 625/JP/14]	ITAT, Jaipur Bench	28.07.2016
2010-11	M/s Ch. Hanumantha Rao v. Income-tax officer, Ward-2(2), Guntur	ITAT, Vishakapatnam Bench	05.05.2017

2010-11	Dhuri Wine (2016) 48 ITR (Trib) 289	ITAT, Chandigarh Bench	09.10.2015
2010-11	D. TAMILRAJAN (2016) 47 CCH 392	ITAT, Cochin Bench	30.06.2016
2009-10	M. KANNAPPAN (2016) 47 CCH 0654	ITAT, Chennai Bench	10.08.2016
2010-11	Rakesh Kumar (2016) 46 CCH 270	ITAT, Amritsar Bench	09.03.2016
2010-11	Shila Mondal, ITA No.336/Kol /2014	ITAT, Kolkata Bench	12.08.2016

3.20. Ld. CIT(A) has placed reliance on the decision of Hon'ble ITAT Chennai Bench in the case of DCIT vs. A. Ramamurthy (2016) 46 CCH 0323 (Chen Trib) whereas the assessee firm has placed reliance on plethora of judgments as mentioned above. Regard different views taken by different courts, it is submitted that Hon'ble Supreme Court in case of CIT v. M/s Vegetables Products Ltd. 88 ITR 192 (SC) has held that when different High Courts have different views the one in favour of the assessee should be adopted. The relevant extract is set out as under:

"It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted."

3.21 Ld. CIT(A) further rejected the assessee firm's contention that some of the sellers insisted for cash payment for lack of documentary evidence in this regard. It is submitted that Id. CIT(A) himself has admitted that more than 50% of payments were accepted through cheques. It support the contention of appellant that where ever cash was not demanded payments were made through cheques. Complete trails of cash being withdrawn from bank and paid to sellers was established before Id. CIT(A) [CIT(A) Page 6]. Ld CIT(A) has not disputed the said factual aspect. Once the factual aspect is accepted by Id. CIT(A) there cannot be any reason for rejection of appellants contention of cash remittance because if not insisted why would we draw cash from bank and make payment in cash rather than issuing cheques is done in other cases.

3.22 Ld. CIT(A) in order to reject the claim of the assessee firm has held that the assessee firm has failed to bring on record that if it did not made the cash payment, the sellers would cancel the deals. In this regard it is submitted that the sellers while negotiating the deal have put such condition and, therefore, evidences in this regard do not exists. Ld. CIT(A) has asked for too much.

3.23 Ld. CIT(A) has also held that the sellers were residents of Jaipur and most of them belonged to the same family and more than 50% of the payments were accepted by them through cheques. In this regard it is submitted that belonging to same family does not mandate to follow same practice as others did. The mode of accepting the payment is always at the discretion of the seller.

3.24 It is also submitted that during the assessment proceedings, the assessee firm has provided complete address of the sellers to the ld. lower authorities. Ld. lower authorities, having doubt about the claim of the assessee firm, could have exercised his statutory powers and examined those sellers to ascertain the truth. Also, ld. AO failed to bring on record any evidence to controvert the claim of the assessee firm.

In view of the above, disallowance of Rs. 1,71,67,000 u/s 40A(3) may please be quashed.”

17. The ld DR is heard who has vehemently argued the matter and took us through the findings of the lower authorities which we have already noted above. He submitted that the matter doesn't fall in any specific clause of Rule 6DD and hence, the disallowance has been rightly made under section 40A(3) of the Act and which should be sustained.

18. We have heard the rival contentions and perused the material available on record. It would be relevant to refer to the provisions of section 40A(3) of the Act which reads as under:

"(3) Where the assessee incurs any expenditure in respect of which 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 exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

(3A) Where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceeds twenty thousand rupees:

Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section 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 exceeds twenty thousand rupees, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors :

Provided further that in the case of payment made for plying, hiring or leasing goods carriages, the provisions of sub-sections (3) and (3A) shall have effect as if for the words "twenty thousand rupees", the words "thirty-five thousand rupees" had been substituted.

(4) Notwithstanding anything contained in any other law for the time being in force or in any contract, where any payment in respect of any expenditure has to be made by an account payee cheque drawn on a bank or account payee

bank draft in order that such expenditure may not be disallowed as a deduction under sub-section (3), then the payment may be made by such cheque or draft; and where the payment is so made or tendered, no person shall be allowed to raise, in any suit or other proceeding, a plea based on the ground that the payment was not made or tendered in cash or in any other manner."

19. The aforesaid provisions have to be considered and interpreted in light of various authorities which have been quoted at the Bar and relied upon by the Id AR and Id DR in support of their respective contentions.

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:-

Date	Bank		Grand Total	Cumulative balance	Utilization		Net Balance
	ICICI Bank	Yes Bank			Date	Amount	
							18,00,000

5-Apr-12	14,50,000	3,50,00	18,00,000	18,00,000			5,07,00
9-Apr-12	-	9,00,000	9,00,000	27,00,000	9-Apr-12	21,93,000	3,34,000
11-Apr-12	-	2,00,000	2,00,000	29,00,000	11-Apr-12	3,73,000	3,34,000
12-Apr-12	-	-	-	29,00,000	-	-	3,34,000
13-Apr-12	-	-	-	29,00,000	-	-	11,97,100
19-Apr-12	-	30,00,000	30,00,000	59,00,000	23-Apr-12	21,36,900	11,57,000
24-Apr-12	30,00,000	25,00,000	55,00,000	1,14,00,000	24-Apr-12	55,40,100	11,57,000
25-Apr-12	-	-	-	1,14,00,000	-	-	11,57,000
30-Apr-12	-	-	-	1,14,00,000	-	-	11,57,000
4-May-12	-	-	-	1,14,00,000	-	-	11,57,000
7-May-12	-	-	-	1,14,00,000	-	-	11,57,000
8-May-12	19,00,000	23,00,000	42,00,000	1,56,00,000	8-May-12	38,55,000	15,02,000
12-May-12	-	-	-	1,56,00,000	-	-	15,02,000
14-May-12	-	-	-	1,56,00,000	-	-	15,02,000
15-May-12	-	-	-	1,56,00,000	-	-	15,02,000
16-May-12	-	15,00,000	15,00,000	1,71,00,000	-	-	30,02,000
17-May-12	-	15,00,000	15,00,000	1,86,00,000	17-May-12	30,69,000	14,33,000
Total	63,50,000	1,42,50,000	1,86,00,000			1,71,67,000	

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.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 15/05/2018.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 15/05/2018

*Ganesh Kr

1. आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:
2. अपीलार्थी / The Appellant- M/s A Daga Royal Arts, Jaipur
3. प्रत्यर्थी / The Respondent- ITO, Ward-2(2), Jaipur
4. आयकर आयुक्त / CIT
5. आयकर आयुक्त(अपील) / The CIT(A)
6. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
7. गार्ड फाईल / Guard File (ITA No. 1065/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant Registrar.