

Cash payment to Govt. licensee for country made liquor won't attract sec. 40A(3) disallowance

Summary – The Kolkata ITAT in a recent case of Ashok Kumar Mondal, (the Assessee) held that where cost price, excise duty, bottling charges, etc. were paid by retail vendor of country made liquor in cash in bank account of wholesale licensee of State government, same would not be disallowed, being payment to agent of State government

Facts

- The assessee was a retail-vendor of country spirit. The sale and purchase was strictly controlled by the State government. As per notification by Excise Department dated 29-8-2005, the assessee made payment consisting of cost of the stock-in-trade, excise duty and bottling charges, etc. to the wholesale licensee ABPL appointed by the State government. The assessee made payments to bank account of wholesale licensee ABPL.
- During the assessment, the Assessing Officer disallowed the cash deposits which were in excess of Rs. 20,000 on each occasion.
- On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On further appeal to the Tribunal:

Held

- There is no dispute in respect of the genuineness of the transactions made by the assessee. So also the identity of the receiver of the funds is not in dispute. Payments made into the Bank account of the wholesale licensee or the appointment of ABPL by the State Government by Notification dated 4-9-2006, stands admitted. Now the whole issue revolves around the point whether the payments made into the account of ABPL are hit by the provisions of section 40A(3) of the Act.
- In this context, it is useful to refer to rule 6(2) of the Income-tax Rules framed by the State Government in exercise of the power conferred by section 85 and section 86 of the Bengal Excise Act, 1909 regulating the issue and removal of country spirit on payment of duty in labelled and capsule bottles from country spirit bottling plants and in bulk from warehouses by licensed wholesale vendors of the same for the purpose of selling country spirit by wholesale. This rule 6(2) stipulates that no retail vendor of country spirit shall deposit duty direct into the local treasury for issue of country spirit to be taken by him from the warehouse concerned, duty, cost price, bottling charges, if there be any, at the prescribed rate and other imposition, as may be prescribed by law, shall be paid by the retail vendor to the credit of the wholesale licensee concerned.
- Now coming to the application of section 40A(3) is concerned, it is found from the CBDT Circular No. 6P, dated 6-7-1968 that this provision under section 40A(3) was designed to counter evasion of tax through claims for expenditure shown to have been incurred in cash with a view to frustrating

proper investigation by the department as to the identity of the payee and reasonableness of the payment. When this is the primary object of enacting section 40A(3), it will have to be seen whether the payments made by the assessee into the account of ABPL would frustrate the purpose of enactment of section 40A(3). By virtue of payment through cash, the wholesale licensee with exclusive privilege for bottling and/or sale by wholesale country spirit in sealed or capsule bottles and for manufacture and wholesale supply of country spirit in bulk enjoyed rights in terms of section 22 of the Bengal Excise Act, 1909; thus, ABPL has become an arm of State Government. On this aspect, for all practical purposes, the relationship between the Government and wholesale licensee insofar as dealing with the country made liquor is concerned, is that of the principal and agent, subject to the territorial limitation prescribed in such Notification. Therefore, it can safely be concluded that the payments made to ABPL for all practical purposes are the payments to be reached to the State Government and once this is so, the said wholesale licensee shall be construed as an agent of the State Government. Therefore, it can safely be concluded that once such payments are made to the credit of ABPL, the source and destination of such funds cannot be doubted. Therefore, the provision of section 40A(3) is not frustrated by the assessee making payments into the account of ABPL.

- In *Ashok Mandal v. ITO* [IT Appeal No. 873 (Kol.) of 2012, dated 6-2-2014]; the Tribunal after elaborating discussion, reached a conclusion that the payments made by the assessee for the purchase of country liquor and country spirit from the territorial licensee bottling plant, ABPL was protected by the exemption in terms of rule 6DD(b) of the Income-tax Rules, 1962.
- In view of the above, it may be concluded that that the assessee has a commercial expediency under rule 6(2) of the West Bengal Rules referred to above to make payments to the credit of whole sale licensee who is deemed to be an agent of the State Government, as such in terms of rule 6DD(b) and rule 6DD(k) of the Income-tax Rules, they are exempted and the disallowance made under section 40A(3) could not sustained.